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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1974

No. 74-1304

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, et al.,
*Petitioners,*

vs.

UNITED STATES OF AMERICA.

STATE OF NEVADA ex rel. ROLAND D. WESTERGARD,
State Engineer, *Intervenor.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Ninth Circuit

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UNITED STATES OF AMERICA.

STATE OF NEVADA ex rel. ROLAND D. WESTERGARD,
State Engineer, *Intervenor.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Ninth Circuit

State of Nevada, Intervenor-Appellant in the Circuit Court, respectfully prays that a Writ of Certiorari issue to revew the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 4, 1974.

## OPINION BELOW

The opinion of the court below (Appendix A, pp. i-xviii) has not yet been reported.

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## JURISDICTION

The final judgment of the District Court of Nevada was entered on April 9, 1974, (Appendix B, pp. xix-xxii). The judgment of the Court of Appeals affirming the District Court's judgment was entered on December 4, 1974, (Appendix B, pp. xxii-xxiii). A timely petition for rehearing was denied on January 31, 1975. (Appendix B, pp. xxiii-xxiv). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

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## QUESTIONS PRESENTED

The petitions filed by petitioners, Cappaerts, and the several amicus briefs expertly present to this Court the issues raised and considered in the Ninth Circuit Court decision concerning the authority of the Presidential Proclamation reserving Devil's Hole as a valid basis for reserving water rights and the question of *Res judicata* or collateral estoppel raised by petitioner, State of Nevada, in the lower court; therefore, it seems unnecessary to burden the Court with a repetition of these issues in this application. However, the issues concerning the state-federal conflict as to which government entity should make the determination of the existence and scope of an implied



water right is so vital to the entire State of Nevada and all semi-arid western states that petitioner, State of Nevada, is compelled to emphasize the necessity of a definitive decision on the issue.

The questions presented are:

1. Whether the authority for determining and administering water rights expressly granted to the State of Nevada by Congress can be subsequently precluded and ignored by the United States Government by automatically *implying* from every act of reservation of public domain land an underground water right to water beneath both reserved and adjacent non-reserved, private land.

2. Whether the federal government must comply with state procedure for establishing the existence and scope of any water right, implied reserved right or otherwise, which it desires to assert to the water beneath reserved and non-reserved land.

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## STATUTES INVOLVED

The state and federal statutes involved in this case are set forth in Appendix C, pp. xxv-xxvii.

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## STATEMENT

Petitioners, Cappaerts, have set forth in their brief an extensive and detailed statement of the facts with particular emphasis on facts concerning the nature of the ranch, Devil's Hole, the pupfish and the background

of the Presidential Proclamation reserving Devil's Hole Monument, all of which petitioner, State of Nevada agrees with and it would serve no useful purpose to reiterate in total those facts. However, certain limited facts are worth repeating especially with regards to the action of the United States Government prior to the filing of its Complaint.

In April, 1970, prior to this action and pursuant to state law, appellants, Cappaerts, and their predecessor, Spring Meadows, Inc., filed application with the State of Nevada for appropriation of groundwater by means of wells designated in petitioners, Cappaerts', petition (page 8) as Nos. 5, 16 and 17.

Subsequently, the United States Government through the National Park Service protested in writing said application. A hearing in which the United States Government participated fully through counsel from the Solicitor-General's office, who presented evidence in the form of both witnesses and documents and following such made an extensive oral argument, was held on December 16, 1970. Following the hearing the State Engineer rendered his decision to issue the permits to petitioners, Cappaerts, to appropriate the groundwater. Approximately six months later on August 18, 1971, the United States Government filed in Federal District Court its complaint and motion for a preliminary injunction requesting an injunction be issued against petitioners, Cappaerts, to prevent them from pumping three of their wells, the basis for the complaint being that the pumping of the wells was lowering the water in Devil's Hole Monument to such



an extent that the survival of the Devil's Hole pupfish was threatened and any continuance of the pumping would result in extinction of the fish.

On June 30, 1972, petitioner, State of Nevada, filed a motion to intervene as a defendant and was granted leave to interplead on July 3, 1972.

Following entry of a preliminary and final injunction by the District Court recognizing an implied water right in the United States Government and restricting the pumping of water adjacent to Devil's Hole, notices of appeal were filed with the Ninth Circuit Court of Appeals by petitioners, the Cappaerts, and petitioner, State of Nevada.

Following the submission of briefs and oral argument, the final judgment of the Ninth Circuit Court of Appeals was entered on December 4, 1974, affirming the District Court's judgment on the ground that the reservation of Devil's Hole by the Presidential Proclamation issued pursuant to the authority of the 1906 Act for the Protection of American Antiquities (Act of June 8, 1906. See 306, 34 Stat. 225, now 16 U.S.C. §431-433) created an implied water right in the United States Government to all unappropriated water beneath reserved *and* non-reserved private land necessary to insure the survival of the pupfish; and further, holding that the United States Government is in no way bound by the state water laws in establishing such an implied water right.

**REASON FOR GRANTING THE WRIT**

1. Whether the authority for determining and administering water rights expressly granted to the State of Nevada by Congress can be subsequently precluded and ignored by the United States Government by automatically *implying* from every act of reservation of public domain land an underground water right to water beneath both reserved and adjacent non-reserved private land.

This case presents a classic and heretofore unresolved state-federal conflict in the highly critical area of determining the existence and administration of implied water rights. Only a very small number of cases have dealt with the "implied reservation" doctrine and, therefore, most of the issues concerning the application and scope of the doctrine remain unresolved.

The decision of the Ninth Circuit Court holding that the United States Government need not make any showing of need in order to establish in itself an implied water right and the further holding that the federal government need not comply with state water laws in order to assert and establish such a water right is directly in conflict with long-established applicable state law.

The Ninth Circuit Court decision affirming the judgment of the District Court affectively establishes the principle that the very act of reserving public domain land automatically creates a water right to groundwater beneath reserved and *private land* without regard to need which result flies directly in the face of the reasoning and background for the creation of the implied reservation doctrine. The decision also establishes the further principle that the state automatically loses control over water it previously controlled merely by the reserving of land whether such intent was expressed or not in the act of reservation.



The lower court decision affectively nullifies and is in conflict with several Congressional enactments and several United States Supreme Court cases which unequivocally hold that each state shall control all water on public domain land.

Between 1866 and 1877 Congress enacted several public land laws which were subsequently and judicially interpreted to mean that the existence, use and control of water rights on public domain land should be determined in accordance with local custom, law and court decision.

The first of these Congressional enactments was the Act of July 26, 1886, Ch. 262, §9; 14 Stat. 243 (now Act of July 10, 1952, Ch. 651, §208(a-2), 66 Stat. 560, 43 U.S.C. §661 (1938)), which specifically recognized the existence and validity of water rights acquired prior to the statute pursuant to local custom, law or court decision.

The United States Supreme Court confirmed this interpretation of the 1866 statute by holding that said statute was a Congressional recognition of the validity of water rights established pursuant to local custom.

*Atchison v. Peterson,* 87 U.S. 507 (1874); *Basey v. Gallagher,* 87 U.S. 670, 22 L.Ed. 452 (1874); and *Jennison v. Kirk,* 98 U.S. 453, 460 (1878).

A later, even more significant act in this regard was the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §321 (1958), which was judicially interpreted in 1936 to have severed, for purposes of private acquisition, soil and water rights on public lands, and further provided that such water rights were to be acquired in the manner provided by the law of the state of location, thereby judicially confirming that the water was under *public ownership. California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935); *Federal Power Commission v. Oregon,* 399 U.S. 435, 448 (1955). The Court in *California Oregon Power Co. v. Beaver Portland Cement Co.,* supra, said in interpreting the meaning of the Desert Land Act and the 1866 Act, "(T)he effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use as recognized by local rules and customs and the legislation and judicial decision of the arid land states, as the test and measure of private rights in and to the unappropriated water on the public domain."

In *Ickes v. Fox,* 300 U.S. 82, the Court held that by the Desert Land Act, "if not before, Congress had severed the land and water constituting the public domain and established the rule that for the future the lands should be patently separated . . . ; *but all non-navigable waters were reserved for the use of the*



*public land under the laws of the various arid land states".* Id. at 95. (Emphasis added) The Ninth Circuit Court in 1939 stated that the Act of 1866 was a formal confirmation of local laws and usage which had prior to said date met with acquiescence on the part of the federal government. *U.S. v. Walker River Irrigation District,* 104 F.2d 334 (CCA 9th 1939).

The Desert Land Act has also been interpreted as severing underground water, as well as surface water, from the land and, therefore, applying to all water on or under public land. *State v. Dority,* 225 P.2d 1007 (N. Mex 1950); *California Oregon Power Co. v. Beaver Portland Cement Co., supra.*

The 1866 and 1877 federal acts as subsequently interpreted by the courts are clear Congressional expressions that all water located on public land within a particular state is a subject of primarily local significance, and the rights to use such water should be determined, controlled and administered by the states. The above cases taken together constitute an unequivocal holding that the Desert Land Act and related statutes have transferred sovereign authority over water within these boundaries to the states thereby specifically rejecting the theory that the United States *owns* such water.

By 1913 Nevada, in line with the several cited Congressional enactments and judicial determinations, had adopted a comprehensive water code for surface water which establishes a systematic and orderly procedure for procuring the water rights thereto. Pertinent provisions appear in Appendix C, pp. xxv-xxvi.

A similar statutory scheme was adopted in 1939 for underground water and its pertinent provisions appear in Appendix C, p. xxvii.

The water right statutes of Nevada accord the same privileges to the United States Government as to any other public or private entity in making an appropriation of water. Ownership of real property is not necessary to support the right to use water. The various federal land acts declared all water situate on or under public domain land to be *publici juris,* and the Nevada court and legislature merely carried out that Congressional intent in its water code.

Despite the ramifications of this case and although the lower court clearly recognized the authority of the state over water on public domain land (Appendix A, pp. xiii), it failed in its decision to analyze in any substantive way the true basis for the creation and application of the "implied" reservation doctrine.

The lower court briefly answers the question of withdrawing expressly given state control over water on public land by implication by simply stating that the state water laws do not apply to "reservations" —lands withdrawn from the public domain—citing *Federal Power Commission v. Oregon,* supra, as the authority for its conclusion.

This position without any supporting analysis of the scope and ramifications of the doctrine results in our view in an unwarranted extension of the concept of the implied reservation doctrine. Thus, such an expansion of the doctrine clearly contradicts the ex-



pressed grant of control to the State of Nevada by the Acts of 1866 and 1877.

A close analysis of *Federal Power Commission v. Oregon,* supra, hereinafter referred to as the *Pelton Dam* case will demonstrate that the case is not support for the lower court's decision.

In the *Pelton Dam* case this Court for the first time in a water controversy case made a distinction between public domain and reserved land and then proceeded to state *without discussion* that all prior Congressional enactments with regard to water on the public domain are inapplicable to reserved land. Unfortunately, the Court avoided the effect of the long-standing and well-established principle that all water rights in water on public land shall be determined by state law by simply avoiding a discussion of the principle and making a heretofore unrecognized or undiscussed distinction between public domain and reserved land.

By grounding its decision on the *Pelton Dam* case the Ninth Circuit Court seems to say that when water is located on or below public domain land the state owns it, but if the federal government subsequently reserves the land, ownership of the same water is transferred back to the United States Government—even if by implication.

Specifically involved as a partial basis for the decision was the Federal Power Act, 49 Stat. 863 (1935) 16 U.S.C. §791-828(c) (1958), the provisions of which are not applicable to the present case. The Federal Power Act was an express pronouncement by Congress stating that certain land and the water on that

land should be used for purposes of establishing electric power sources for urgently needed electricity. The Act contains detailed provisions regulating the use of the water needed for the power project; therefore, the need to *imply* the intent to reserve water was not present in that case. The basis of the Court's opinion seems to be that by virtue of the property clause of the United States Constitution allowing the United States Government to own land that once ownership of the land is obtained or recognized, whichever the case might be, the right to water appurtenant thereto is established simply by virtue of the ownership.

Although the Court in the *Pelton Dam* case discussed the theory of ownership of land as creating a water right in the United States, all that was necessary to sustain the issuance of the license without state approval was the recognition that the Federal Power Act, as an expressed purpose of Congress to utilize certain water in furtherance of its constitutional power for the protection of the general welfare (U.S. Constitution, Art. I, §8-9), superseded the inconsistent provision of Oregon law. The real justification and effect of the *Pelton Dam* decision was that the purpose of the Federal Power Act to provide much needed electrical power for the general welfare of the people must take priority over the state's concern for the conservation of the fish.

A thorough analysis of the facts of each of the relatively few cases that have invoked the implied reservation doctrine establishes that said doctrine is based upon the concept of necessity, whether it is the



need to provide a living for the Indians (*Winters v. U.S.*, 207 U.S. 564; *Tweedy v. Texas Company*, 286 Fed. Supp. 383 (D. Mont. 1968)), or to provide much needed electrical power or to carry out the express power of Congress in providing for the national defense, *Nevada ex rel. Shamberger v. U.S.*, 165 Fed. Supp. 600 (D. Nev. 1951) and not upon the concept of ownership by virtue of ownership of the land. For example, in the case of *Tweedy v. Texas Company*, supra, one of two district court cases cited by the Ninth Circuit, the judge reasoned in between a substantial amount of dictum that what is reserved to the Indians is not the ownership of the water, but the right to use it for the purpose of satisfying a need. The concept well established in the United States Supreme Court cases interpreting the various land acts that all water within a particular state on public land belongs to the public and rights thereto are to be adjudicated and administered by the state of location is simply incompatible with the basic theory of ownership in any particular person or entity. The theory that the United States Government is the *owner* of water by implication is not supported by any prior decision of this Court.

This case is undoubtedly a classic confrontation between economics and environment, but its effects are not confined to a small area but touch the entire State of Nevada—indeed, as pointed out in petitioners, Cappaerts', petition, all the semi-arid states. (Cappaert Petition for Certiorari, p. 10)

Until the doctrine was applied in this case, no one could point to a case where the implied reservation

theory resulted in demonstrable injustice; however, we have now reached that result. Carrying the decision of the Circuit Court to its logical conclusion it must be stated that as a practical matter in any conflict between the needs of man and the needs of fish, the fish have priority. Nothing is said about the possible extinction or accelerated evolution of man if by the greatly expanded extension of the applied reservation doctrine man finds it virtually impossible to live because of the priority given to other species.

2. Whether the federal government must comply with state procedure for establishing the existence and scope of any water right, implied reserved right or otherwise, which it desires to assert to the water beneath reserved and non-reserved land.

The practical effect of the lower court's decision is to create a new, dual and overlapping water rights adjudication and administration system. This results despite the fact that there is no federal system for the adjudication and administration of water rights comparable to the long-standing state systems. If the lower court decision be allowed to stand, the recognized certainty in establishing the nature and scope of water rights which has resulted from the tested and proven state system will virtually disappear.

Sound administration of the vital area of water rights dictates that the determination, adjudication and administration of *all* water rights whether appropriative, riparian or implied must be within the confines of the existing state statutory schemes. Several federal district courts have stated that what water rights the United States may have and the



extent thereof must be determined by the law of Nevada. *U.S. v. Agnnen,* 300 Fed. Supp. 256 (D. Nev. 1968); *U.S. v. Humboldt Lovelock Light and Heat,* 97 F.2d 38 (9th Cir. 1938).

The Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.,* 73 F.2d 555 (9th Cir. 1934), 295 U.S. 142 (1935), laid the groundwork for state control when it provided for judicial acceptance of the Congressional policy, exerted through the various federal land acts, that water rights being essentially a local problem could be best handled in accordance with the state's own custom and law. This policy established the principle that the states should determine water rights unless Congress *expressly* stated otherwise.

In 1952 in an obvious attempt to waive its sovereign immunity and to give the states the power to adjudicate and administer water rights involving rights claimed by the United States Government, Congress passed as part of the Department of Justice Appropriation Act of July 10, 1952, Ch. 651 §208(a)-(c), 66 Stat. 560, 43 U.S.C. §666 (1970), the so-called McCarran Amendment (Appendix C, p. xxv).

In holding that the United States Government need not comply with and exhaust state procedures for determining its implied water rights because the McCarran Act requires the United States to be a party defendant and only then is the United States subject to state law, the lower court gave no consideration at all to the effect and meaning of two recent decisions of this Court which set forth certain principles regarding the state's adjudication of water rights. *U.S. v. Dis-*

*trict Court for Eagle County,* 401 U.S. 520, 28 L.Ed. 278, 91 S.Ct. 998 (1971); *U.S. v. District Court for Division No. 5,* 401 U.S. 527, 28 L.Ed.2d 284, 91 S.Ct. 100 (1971).

In *U.S. v. District Court for Eagle County,* supra, this Court held that any federal questions presented in a state water adjudication proceeding could be decided originally by the state subject to review in a federal court. This Court further went on to hold that the United States Government's claim to reserved water rights, implied or otherwise, was subject to adjudication under state law by virtue of the McCarran Amendment by stating:

> "(W)e deal with an all-exclusive statute concerning the adjudication of right to the use of water of a river system which in section 666(a)(1) had no exceptions and which, as we read it, includes appropriative rights, riparian rights, and *reserved rights*".

The federal government in the *Eagle* case also argued that its claimed reserved rights should not be subjected to the state proceedings because such implied rights may conflict with state appropriative rights which are inconsistent with reserved rights, but this Court rejected the argument and clearly recognized the jurisdiction of the state to make a determination of the existence and extent of reserved rights by saying:

> "All *such questions,* including the volume and scope of a particular reserved right, are federal questions, which, *if preserved,* can be reviewed here after final judgment by a Colorado Court". (Emphasis added)



In *U.S. v. District Court for Division No. 5,* supra, a companion case to the *Eagle* case, this Court again reiterated its position that the states were perfectly capable of determining and adjudicating all federal water claims regardless of how they might arise. Neitheir case indicates nor implies that there is any exception to this jurisdiction. It seems apparent from the reasoning in these two cases that this Court intended that the determination and administration of all federal water rights, including reserved rights, be in the state under the long-established state procedures in order to eliminate the perplexities, conflicts and uncertainties obvious in a system of dual jurisdiction of water matters. This seems especially supportable in light of the fact that there is no federal system for the adjudication and administration of water rights comparable to the state system.

To carry the reasoning of the Ninth Circuit Court to its natural conclusion means that under the new, fuzzy, judicially created dual system, whoever arrives first at the courthouse of its choice will determine the jurisdiction for determining water rights.

To key the availability of state procedures to determine the federal government water rights to the word, *defendant,* in the McCarran Act places an intolerable burden on the State of Nevada in light of its administrative adjudication procedure which, as do several other states, substitutes in the first instance in place of a court a state engineer, expert in the area of water (Appendix C, Ch. 534, Nevada Revised Statutes, §534.020). The engineer's decisions are subject to judicial review by the district court (Appendix C,

N.R.S. 533.450). In order to establish and maintain any certainty in terms of scope of use in its grant to a private user of the right to use well water on land adjacent to reserved land, the State of Nevada would be required to file a court action each time in order to qualify the United States Government as a defendant, which would under the reasoning of the lower court decision then allow the state to determine the question of implied water rights on reserved land.

A close reading of the reasoning behind the conclusions of the *Eagle* case, supra, does not support the proposition that the United States does not have to perfect its water rights pursuant to state law. In fact, considering the holding of the case that the states do have the right to adjudicate federal water rights, and viewed in the light of the historical development of water law, it is more reasonable to conclude that the case supports the proposition that the state should initially determine all water rights whether private, state or federal. This conclusion would seem even more reasonable in light of the fact that only the states have an established procedure for such determination. The substantive principles for determining the existence of reserved rights can be applied through state procedures subject to federal court review. Such a result resolves most of the uncertainty and unanswered questions which exist under the theory that the United States Government could, at any time it desires by virtue of unilaterally invoking the implied reservation doctrine, exercise exclusive control over water on or under reserved and non-reserved land.



Absent a federal water law, the only alternative to recognizing the state's right to determine and administer water rights is the use of a special master appointed by the federal district court in each and every case. Would the special master be discharged after each case? If a dispute arose as to violation of court decree, would new masters be appointed? Who would pay the cost? Numerous problems are created if this system becomes the accepted system for adjudicating and administering federal water rights.

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## CONCLUSION

For the foregoing reasons petitioner, State of Nevada, respectfully urges this Court to act to clarify the many unresolved procedural and substantive issues which have been raised by the implied reservation doctrine and vitally affect substantially all of the western states.

Dated, April 16, 1975.

Respectfully submitted,

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**(Appendices Follow)**

# APPENDIX

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Appendix A—Opinion Below

Appendix B—Judgments Below

1. Final Decree of District Court
2. Judgment of Affirmance
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   (b) Nevada Underground Water Act (NRS Ch. 534)

## Appendix A

### OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants, State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor No. 74-1690.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant, No. 74-2186.

OPINION

Appeal from the United States District Court for the District of Nevada.

Before: CARTER and CHOY, Circuit Judges, and SOLOMON,* District Judge.

SOLOMON, Judge:

Pupfish (cyprinodon diabolis) live in Devil's Hole, in the Death Valley National Monument in Nevada. They are a unique and endangered species. In an action filed by the United States (Government) to protect these fish, the district court limited the amount of

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

water which the owners of a nearby cattle ranch may pump. The Cappaerts, owners of the ranch, and the State of Nevada, which intervened on the side of the Cappaerts, appeal.

The Cappaerts' ranch consists of 12,000 acres, of which 4,000 acres are in cultivation. The ranch, which represents an investment of more than 7 million dollars, has an annual payroll of more than $340,000 and employs more than 80 people. Between 1700 and 1800 head of cattle are fed on the ranch.

The Cappaerts drilled wells and pump groundwater[1] on their land for irrigation. Devil's Hole, a part of the Death Valley National Monument, is located within three miles of several wells on the ranch. Devil's Hole consists of a 40-acre tract in which there is a deep limestone cavern. At the bottom of this cavern there is a pool about 65 feet long, 10 feet wide, and more than 200 feet deep. There are steep rock walls on three sides of the pool, but on the fourth side there is a sloping rock shelf on which algae grows. This pool is part of the 4,500 square mile groundwater system from which the Cappaerts pump their water.

The Devil's Hole pupfish live in this pool. These pupfish evolved after the Death Valley Lake System dried up isolating this species of fish from its ancestral stock. The pupfish population varies from 200 in the winter to 800 after spawning in the spring and depends for its survival on the sloping rock shelf

[1]In this opinion "groundwater" will be used synonymously with "underground water".



which provides food and a spawning ground. The Devil's Hole pupfish are less than one inch long and do not exist anywhere else in the world. They have been designated an endangered species under the Endangered Species Act of 1973, 16 U.S.C. § 1533 (1974), 50 C.F.R. § 17.

The water level in the pool is measured from a copper washer which the U.S. Geological Survey placed on the shelf in 1962. Between 1962 and 1968 the average water level was 1.2 feet below the marker. In 1968, after the Cappaerts began to pump, the summer water level[2] steadily decreased: in 1970 to 3.17 feet below the marker; in 1971 to 3.48 feet and in 1972 to 3.9 feet. At these water levels large areas of the critical rock shelf are exposed. At 3.6 feet below the marker, 42 per cent of the shelf is exposed, and at 3.7 feet the exposure increases to 55 per cent. The shelf exposure decreases the algae production and limits the spawning area which in turn reduces the Devil's Hole pupfish's chance to survive.

On June 5, 1973, following a number of hearings, the court granted the Government's motion for a preliminary injunction. This injunction required that pumping on the Cappaert's ranch be limited so that the mean water level of 3.0 feet below the copper washer be attained within 90 days. The court also appointed a special master to control the pumping of other wells in order to reach and maintain this water level.

[2]The Cappaerts pump water only from March to October. During the rest of the year the water level is higher.

Among the extensive findings entered by the District Court were the following:

> "9. Through the Presidential Proclamation of January 17, 1952, and its publication in the Federal Register on January 23, 1952 (17 Fed. Reg. 691), the unappropriated waters in, on, under and appurtenant to Devil's Hole were withdrawn from private appropriation as against the United States and reserved to the extent necessary for the requirements and purposes of the said reservation."
>
> "The purposes of the reservation of Devil's Hole as part of Death Valley National Monument includes the preservation of the pool of water and the preservation of the Devil's Hole pupfish (Cyprinodon diabolis) which live therein."
>
> "14. The natural rock shelf and rubble thereon on which the Devil's Hole pupfish depend for feeding, reproduction and, hence their survival, is nearly 100% covered with water when there is a mean water level of 3.0 feet below the copper washer."
>
> "16. The defendants' pumping of groundwater from wells known as Nos. 1, 2, 3, 4, 5 and 6, and 16 and 17, has drawn water from the springs and underground sources which comprise the supply for Devil's Hole. Because the defendants' wells and Devil's Hole are hydraulically connected, defendants' pumping has caused the water level in Devil's Hole to drop."
>
> "24. In order to maintain a viable continuous population of Devil's Hole pupfish, the water level in Devil's Hole must be maintained above the natural rock shelf and the rubble thereon, which is a minimum of not less than 3.0 feet below the copper washer."



> "25. If the water level at Devil's Hole drops below 3.0 feet below the copper washer, the survival of the Devil's Hole pupfish will be threatened, that is, the time of their becoming extinct in the natural evolutionary order will be accelerated."

Both the Cappaerts and the State of Nevada appealed. The Cappaerts also filed motions to modify, pending appeal, the preliminary injunction to permit them to pump down to the 3.7 feet below the copper washer. Pending appeal, this Court permitted the Cappaerts to pump so long as the water level did not go lower than 3.3 feet below the copper washer.

On January 17, 1952, President Truman, by Presidential Proclamation 2961, withdrew Devil's Hole from the public domain and made it part of the Death Valley National Monument. U.S. Code Cong. & Adm. News, 82d Cong., 2d Sess., Vol. 1 at 964 (1952); 17 Fed. Reg. 691. The Proclamation was issued under the Act for the Preservation of American Antiquities, 16 U.S.C. § 431 (1974), which authorizes the President to declare ". . . objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments. . . ."

The Government contends that the Proclamation, with its express reservation of the Devil's Hole pool and the surrounding land from the public domain, contains an *implied* reservation of enough groundwater to assure preservation of the pupfish in that pool.

The implied reservation of water doctrine originated in *Winters v. United States,* 207 U.S. 564 (1908).[3] The Court in *Winters* held that private landowners could not impair Indian rights in a river which formed one boundary of a reservation, even though the Congressional grant of the land to the Indians had not mentioned water rights. The land reserved for the Indians was arid. The Court held that a grant of water rights must be implied because Congress intended by the grant of land to encourage the Indians to become farmers.

In *Arizona v. California,* 373 U.S. 546, 601 (1963), the Supreme Court extended the reservation doctrine of *Winters* to include waters reserved for federal lands which had been set aside for recreation, wildlife, or forests. This was reaffirmed and extended in *United States v. District Court for Eagle County,* 401 U.S. 520, 522-23 (1971). There the Court held that the Federal Government's authority "to reserve waters for the use and benefit of federally reserved lands . . ." extended to "any federal enclave."

The Cappaerts contend, however, that the doctrine of implied reservation of water does not apply to groundwater, but only to surface water. Although these Supreme Court cases involved only surface water

[3]It was established before *Winters* that the Federal Government has the power to reserve waters which are needed for federal lands and to exempt those waters from appropriation under state laws. *United States v. The Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703, 706 (1899); *United States v. Winans,* 198 U.S. 371, 383 (1905). In those cases, however, the Government had expressly dealt with water rights.



rights, the reservation of water doctrine is not so limited.

Two cases in the Ninth Circuit approved the application of the reservation of groundwater when it clearly appeared that water was needed to accomplish the purpose of the reservation. *Nevada ex rel. Shamberger v. United States,* 165 F.Supp. 600 (D. Nev. 1958), *aff'd on other grounds,* 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.,* 286 F.Supp. 383 (D. Mont. 1968).

In our view the United States may reserve not only surface water, but also underground water.[4]

The Cappaerts assert that the 1952 Presidential Proclamation was intended to preserve only the Devil's Hole pool with its unique limestone formation and not to protect the pupfish, and that therefore there was no implied reservation of groundwater. We reject that argument.

The Proclamation added the Devil's Hole pool to the Death Valley National Monument after reciting:

> "WHEREAS the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original

[4]It is interesting that Nevada administers its water laws so as to provide that rights to groundwater can be perfected just as readily as rights to surface water.

ancestral stock that in Pleistocene times was common to the entire region; and

"WHEREAS the said pool is of such outstanding scientific importance that it should be given special protection. . . ."

The fundamental purpose of the reservation of the Devil's Hole pool was to assure that the pool would not suffer changes from its condition at the time the Proclamation was issued in 1952; that condition included the pool's unique inhabitants, the pupfish. The Proclamation referred to the significant contribution of the pupfish to the scientific importance of the Devil's Hole pool; it implicitly reserved enough groundwater to assure preservation of the pupfish. This conclusion is reinforced by the National Park Service Act, 16 U.S.C. § 1 (1974), which states that "the fundamental purpose" of all national parks and monuments is ". . . to conserve the scenery . . . and the wild life therein . . . by such means as will leave them unimpaired for the enjoyment of future generations."

The Cappaerts contend that under Nevada law they have ownership rights to the underground water which can only be taken from them by eminent domain. They assert that the 1952 Presidential Proclamation attempted to reserve underground water which belonged to their predecessor in interest.

In 1890 and 1892, the State of Nevada by selection acquired fee simple title from the United States Government to the land now owned by the Cappaerts. The Desert Land Act of 1877, 43 U.S.C. § 321 (1964), as construed in *California-Oregon Power Co. v. Beaver*



*Portland Cement Co.*, 295 U.S. 142, 162 (1935), provides that a transfer of federal land out of the public domain after the date of the Act would not pass title to any unappropriated appurtenant water; water rights would be determined under the law of the state in which the land was located. Because water rights were severed from title in 1877, Nevada got no water rights in 1890 and 1892 when it acquired title to the Cappaerts' land. Therefore, the Cappaerts, as successors in interest, possess no water rights unless they or a predecessor acquired such rights under Nevada law.

The Cappaerts argue that Nevada has adopted the old common law doctrine, established in *Acton v. Blundell*, 12 M. & W. 324 (Exch. Chamber 1843), that a landowner has unlimited dominion over all waters beneath his property. This doctrine, the Cappaerts contend, establishes their water rights as a matter of Nevada law.

The Supreme Court of Nevada in *Jones v. Adams*, 19 Nev. 78, 6 P. 442 (1885), repealed that common law doctrine. The court adopted and applied the theory of prior appropriation[5] as the basis for determining water rights. The doctrine of prior appropriation was reaffirmed in *Reno Smelting, Milling &*

[5]Under the doctrine of prior appropriation, the first person to possess by beneficial use water for domestic purposes, mining, agriculture, or manufacturing has vested and accrued rights to the water as against any later appropriators. The central principle of the doctrine is beneficial use of water, not land ownership. *Atchison v. Peterson*, 87 U.S. 507 (1874); Powell, Real Property, Vol. 5, ¶734, page 442.

*Reduction Works v. C. C. Stevenson,* 20 Nev. 269, 282, 21 P. 317 (1889).

In 1913[6] and 1939,[7] Nevada enacted statutes providing that, subject to existing rights, all waters in Nevada belong to the public and may be appropriated as provided by statute, and not otherwise. Because no one had previously appropriated water rights through beneficial use, there were no "existing waters" to water on the Cappaerts' land in 1939. Thereafter, water rights could only be acquired, as the statutes provided, by obtaining a permit from the state. N.R.S. 533.325.

The constitutionality of the basic principles of the Nevada Water Code was upheld in *Humboldt Lovelock Irrigation Light & Power Co. v. Smith,* 25 F.Supp. 571 (D. Nev. 1938). Such statutes which abolished common law water rights when the landowner had not made actual beneficial use of the water were held to be a valid exercise of the police power. *California-Oregon Power Co. v. Beaver Portland Cement Co.,* 73 F.2d 555 (9th Cir. 1934), *aff'd on other grounds,* 295 U.S. 142 (1935).

Here neither the Cappaerts nor their predecessors made actual beneficial use of water until 1968. Even

[6]N.R.S. 533.030. Appropriation for beneficial use.
"1. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise."

[7]N.R.S. 534.020.
"All underground waters within the boundaries of the state belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise."



if they had some common law claim, they had not established a vested property right in the water based on prior appropriations before Nevada declared that groundwater belonged to the public.

Finally, the Cappaerts contend the Government is estopped from enjoining them from the unrestricted use of their wells located more than one mile from Devil's Hole. In 1969, the Cappaerts and the Government entered into a land exchange. The Cappaerts received land within one mile of Devil's Hole under a patent granting them "all rights, privileges, immunities and appurtenances . . . subject to any vested and accrued water rights for mining, agriculture, manufacturing or other purposes. . . ." The Cappaerts have drilled wells and pumped water on this land.

The Cappaerts admit they had no oral understanding with the Government agents about the water pumping, and they further admit that these agents made no oral representation. The Cappaerts argue, however, that the Government knew at the time of the land exchange that water wells would be drilled, but that the Government specified only that no wells should be drilled within one mile of Devil's Hole. The Cappaerts say that they spent large sums of money in drilling the wells and in changing their farming operations, relying on their justifiable belief that they could drill wells and pump water without limitation.

This contention lacks merit. Estoppel cannot be invoked against the Government under the facts of this case. The statement of Mr. Justice Black in *United*

*States v. California,* 332 U.S. 19, 40 (1947), is particularly appropriate here.

> "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

The rule that estoppel may not be invoked against the Government in cases involving public lands is set out in the excellent opinion of Judge Barnes in *Beaver v. United States,* 350 F.2d 4 (9th Cir. 1965).

Even if the doctrine of estoppel were available against the Government, it could not be applied here because there were no misleading statements or conduct that would give rise to an estoppel between private parties. Here the Government is not asking the Cappaerts to stop pumping but only to limit pumping to the level at which the pupfish can survive.

The State of Nevada, as intervenor, has asserted additional grounds for reversal.

Nevada contends that the federal government is bound by state water laws, and that the rights which the Government asserts here were not acquired in conformity with state law. Under the Nevada law in effect in 1952, water rights could only be perfected by the issuance of a permit by the State Engineer.



The Government asserts that its rights were established by the implied reservation in the Presidential Proclamation of 1952 and that the United States is not bound by state water laws when it reserves land from the public domain. We agree.

The Desert Land Act of 1877, *supra,* severed soil and water rights on "public lands" and provided that such water rights were to be acquired in the manner provided by the law of the state of location. *California-Oregon Power Co. v. Beaver Cement Co., supra* at 162. But state water laws do not apply to "reservations"—lands withdrawn from the public domain. *Federal Power Commission v. Oregon,* 349 U.S. 435, 444, 448 (1955).

We hold that the Proclamation of 1952, which withdrew the Devil's Hole pool from the public domain, implicitly reserved the waters necessary to sustain the pupfish and legally established the Government's rights as against any future appropriation.

Nevada next contends that the District Court did not have jurisdiction to adjudicate the water rights in this case. Nevada argues that the Government must exhaust state procedures for determining water rights before going to a federal court. There is no merit in this contention.

Nevada relies on the so-called McCarran Amendment, 43 U.S.C. § 666 (1964).[8] That statute waives

---

[8] "Suits for adjudication of water rights—Joinder of United States as defendant; costs

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of

the sovereign immunity of the United States in certain cases involving adjudication of water rights. The waiver enables states to adjudicate competing claims for water rights in certain cases in which the United States is one of the claimants.

The McCarran Amendment was enacted to waive sovereign immunity when the United States is a defendant in a state or federal action so that water rights may be fairly and fully adjudicated. Congress did not intend to limit the forums available to the United States as a plaintiff by narrowing federal court jurisdiction. In *United States v. Nevada et al.*, 412 U.S. 534, 538 (1973), the Supreme Court noted that the District Court had jurisdiction to hear a case brought by the United States involving competing claims to water rights.

Nevada also contends that even if the District Court had concurrent jurisdiction with the state courts, the doctrine or res judicata bars the Government from

water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

*Provided*, That no judgment for costs shall be entered against the United States in any such suit.

Service of summons

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative."



collaterally attacking the decision of a state administrative body—here the State Engineer.

In April, 1970, the Cappaerts applied to the State Engineer for permits to use groundwater from several wells.[9] The United States was not a party to these proceedings, nor was it ever served with process. Nevertheless, employees of the National Park Service learned of the applications through a public notice. A field solicitor for the National Park Service protested the applications because extracting groundwater would lower the water level in the Devil's Hole pool and might endanger the pupfish.

At the hearing held before the State Engineer in December, 1970, the solicitor explained the geological and hydrological bases for the Government's concern. He asked that the Cappaerts' applications be denied or postponed pending furter scientific studies. The solicitor did not raise the jurisdictional issue or any of the legal issues which the United States had the right to assert.

In August, 1971, the Government filed this action in District Court to enjoin the Cappaerts from infringing on the Government's water rights at Devil's

[9]Sections 534.050 and 534.080 of the Nevada Revised Statutes both provide that rights to use groundwater must be obtained in compliance with Chapter 533. That chapter provides that a person who wishes to appropriate public water for his use must file an application with the State Engineer and must then publish notice of the application. N.R.S. 533.325 and 533.360. Interested persons may protest the application, and the application and protest may be considered at a hearing by the State Engineer. N.R.S. 533.365. The application may be refused if to grant it would be "detrimental to the public welfare". N.R.S. 533.370.

Hole. Nevada contends that the State Engineer's decision is res judicata and this action is therefore barred. We disagree.

The State Engineer did not have the authority to adjudicate the water rights of the United States because the United States did not waive its sovereign immunity.

Nevada's reliance here on the McCarran Amendment[10] is misplaced. The McCarran Amendment was enacted to waive the sovereign immunity of the United States in cases in which the presence of the United States as a party was necessary to the full and fair adjudication of competing claims to water rights. The Supreme Court in *Dugan v. Rank,* 372 U.S. 609, 618 (1963), interpreted that statute to waive soverign immunity only in ". . . a case involving a *general* adjudication of 'all the rights of various owners on a given stream,' . . . ." *See State of California v. Rank,* 293 F.2d 340, 346 (9th Cir. 1961). The Senate Report on the bill which became the McCarran Amendment shows the type of adjudication which was contemplated by Congress. The Report contained the following excerpt from *Pacific Live Stock Co. v. Lewis,* 241 U.S. 440, 447 (1916):

> ". . . All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights. . . ." S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951).

[10]See Footnote 8, *supra.*



The proceeding before the State Engineer of Nevada was not a "general adjudication". The United States was not required to appear and prove its water rights to prevent forfeiture of its claims; the water rights of the United States were not in issue. The United States appeared only to explain the factual basis on which it opposed the Cappaerts' applications.

Furthermore, the McCarran Amendment waives sovereign immunity only in cases in which the United States is a defendant and has been served with process. The United States was neither a defendant nor served with process in the proceedings before the State Engineer.

Even if the United States had waived its sovereign immunity, we are not bound to give res judicata effect to the decision of an administrative body in a case of this kind. As the court said in *Grose v. Cohen,* 406 F.2d 823, 824 (4th Cir. 1969):

> "*Res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings. . . . Application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, . . . but practical reasons may exist for refusing to apply it, e.g., United States v. Stone & Downer Co., 274 U.S. 225 (1927). And in any event, when traditional concepts of *res judicata* do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, § 18.03 (1958)."

Although the State Engineer may have expertise in the administration of Nevada's water laws, there is no

evidence that he is qualified to consider or decide the complex issues of federal law involved in this case. The State Engineer's decision is not entitled to res judicata effect in this action.

We affirm the decision of the District Court. The District Court held the water level should be maintained at 3.0 feet below the copper washer in order to preserve the pupfish in the Devil's Hole pool. Pending this appeal, we permitted the Cappaerts to pump as long as the water level did not go below 3.3 feet. We remand this case to the District Court to determine whether, on the facts developed during the pendency of this appeal, the lower water level may be adequate to preserve the pupfish.

We direct the District Court to retain continuing jurisdiction so that it may promptly act if a change in water level is required to preserve and protect the pupfish in the Devil's Hole pool.

AFFIRMED and REMANDED.



## Appendix B

### JUDGMENTS BELOW

#### 1. Final Decree of District Court

In the United States District Court
for the District of Nevada

Civil LV-1687

| | |
|---|---|
| United States of America, | Plaintiff, |
| vs. | |
| Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, individuals, and Spring Meadows Ranch, | Defendants. |

[Filed Apr. 9, 1974]

FINAL DECREE, ORDER CONTINUING APPOINTMENT OF SPECIAL MASTER, AND AWARD OF COSTS

I.

*Final Decree*

This action having been submitted to this Court on plaintiff's application for a permanent injunction seeking to enjoin the defendants from pumping, except for domestic purposes, from wells Nos. 1, 2, 3, 4 and 5, located in Section 7, T. 18 S., R. 51 E.; well No. 6, located in Section 3, T. 18 S., R. 50 E.; wells

Nos. 16 and 17, located in Section 8, T. 18 S., R. 51 E.; all other wells now existing or hereafter drilled within Section 28, 33 and 34, T. 17 S., R. 50 E.; within Sections 31 and 32, T. 17 S., R. 51 E.; within Sections 2, 3, 4, 9, 10, 11, 12, 13, 14 and 15, T. 18 S., R. 50 E.; and within Sections 5, 6, 7, 8, 17 and 18, T. 18 S., R. 51 E.; M.D.B.&M., and the Court having considered the pleadings, the affidavits, the testimony, the exhibits, the briefs, the oral argument of counsel, its findings of fact, conclusions of law and preliminary injunction of June 5, 1973, and having concluded that a permanent injunction should issue,

It Is Ordered, Adjudged and Decreed that, except for domestic purposes, the defendants are forthwith permanently enjoined as follows:

To limit the pumping from underground waters from wells Nos. 1, 2, 3, 4 and 5, located in Section 7, T. 18 S., R. 51 E.; well No. 6, located in Section 3, T. 18 S., R. 50 E.; wells Nos. 16 and 17, located in Section 8, T. 18 S., R. 51 E.; all other wells now existing or hereafter drilled within Section 28, 33 and 34, T. 17 S., R. 50 E.; within Sections 31 and 32, T. 17 S., R. 51 E.; within Sections 2, 3, 4, 9, 10, 11, 12, 13, 14 and 15, T. 18 S., R. 50 E.; and within Sections 5, 6, 7, 8, 17 and 18, T. 18 S., R. 51 E., M.D.B.&M., to the extent required to achieve and to maintain at Devil's Hole, Death Valley National Monument, a daily mean water level of 3.0 feet below the copper washer described in finding of fact No. 11.



## II.

### *Order Continuing the Appointment of Special Master*

With the consent of all counsel, Leonard C. Halpenny, President of Water Development Corporation, of Tucson, Arizona, was, on June 5, 1973, appointed Special Master with full power under Rule 53 of the Federal Rules of Civil Procedure to establish the maximum quantity of water that the defendants may pump from their wells in order to carry out the terms of the preliminary injunction, to keep a daily log and to file periodic reports.

It Is Ordered that the said Special Master is continued in office until further order of this Court to:

(a) Establish forthwith for each of the defendants' wells now existing or hereafter drilled, more fully described above in the final decree, the maximum quantity of water, if any, that may be pumped consistent with this Court's final decree, minimizing, whenever possible, the injury to defendants' livestock and agricultural pursuits.

(b) Keep a daily log of the quantities of water, if any, pumped from each of the said wells; maintain a record of the daily mean water level at Devil's Hole; and maintain such other records of his administration as the Special Master, in his judgment, shall be deemed necessary.

(c) Once a month, report fully in writing on his administration as Special Master.

III.

*Award of Costs*

Costs are awarded to the United States, the prevailing party, and against the defendants. Costs include reasonable fees and reasonable expenses of the Special Master incurred to date and to be incurred in the future in the enforcement of this Court's final decree.

Dated: April 9th, 1974.

/s/ Roger D. Foley
District Judge

**2. Judgment of Affirmance**

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, et al. Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant. Nos. 74-1690 & 74-2186, D.C. No. Civil LV 1687.

APPEAL from the United States District Court for the District of NEVADA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of NEVADA and was duly submitted.



ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court, in this Cause be, and hereby is AFFIRMED AND REMANDED.

A True Copy
Attest 2/20/75
Emil E. Melfi, Jr., Clerk
By /s/ Ray Hewitt
Ray Hewitt, Senior Deputy

Filed and entered December 4, 1974.

**3. Order Denying Rehearing**

United States Court of Appeals, for the Ninth Circuit.

Filed: January 31, 1975

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor, No. 74-1690.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant. No. 74-2186.

## ORDER

Before: CARTER and CHOY, Circuit Judges, and SOLOMON,* District Judge.

The panel voted to deny both the appellants' and the intervenor-appellant's petitions for rehearing. Judge Choy voted to reject the suggestions for a rehearing en banc, and Judges Carter and Solomon have recommended the rejection of these suggestions.

The full court was advised of the suggestions for an en banc rehearing. No judge has requested a vote on these suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for a rehearing en banc are rejected.

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.



## Appendix C

## STATUTES INVOLVED

### 1. Federal Statutes

**THE McCARRAN AMENDMENT, 43 U.S.C. § 666(a)**

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where is appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

### 2. State Statutes

(a) The 1913 Nevada Act for the Adjudication of Water Rights, &c., now ch. 533 of the Nevada Revised Statutes, provides in pertinent part as follows:

533.010. *"Person" defined.* As used in this chapter, "person" includes a corporation, an associa-

tion, the United States, and the State, as well as a natural person.

533.025. *Water belongs to public.* The water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public.

533.030. *Appropriation for beneficial use.*

1. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise.

533.035. *Beneficial use: Basis, measure and limit of right to use.* Beneficial use shall be the basis, measure and the limit of the right to use of water.

533.450. *Orders, decisions of state engineer subject to judicial review: Procedure; appeals; appearance of attorney general.*

1. Any person feeling himself aggrieved by any order or decision of the state engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree. Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order



or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

(b) The 1939 Nevada Act relating to Underground Waters, now ch. 534 of the Nevada Revised Statutes, provides in pertinent part as follows:

534.010(d). *Definitions.*

(d) "Percolating waters" are underground waters, the course and boundaries of which are incapable of determination.

2. As used in this chapter, the terms "underground water" and "groundwater" are synonymous.

534.020. *Underground waters belong to public; subject to appropriation for beneficial use; declaration of legislative intent.*

1. All underground waters within the boundaries of the state belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise.

Supreme Court, U. S.
FILED
MAY 3 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1974

## No. 74-1304

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, et al.,
*Petitioners,*

VS.

UNITED STATES OF AMERICA.

STATE OF NEVADA ex rel. ROLAND D. WESTERGARD,
State Engineer, *Intervenor.*

## AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1974

No. 74-1304

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, et al.,
*Petitioners,*

vs.

UNITED STATES OF AMERICA.

STATE OF NEVADA ex rel. ROLAND D. WESTERGARD,
State Engineer, *Intervenor.*

## AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

### I. INTEREST OF AMICI

The Western States named herein as *amici curiae* all have systems for the administration and the determination of water rights. Due in significant part to the security afforded by water rights granted under these systems, the West has been transformed into an economically productive and socially inhabitable

region. R. J. Moses, Federal-State Water Problems, 47 *Denver L. J.* 194 (1970). As the Public Land Law Review Commission stated in its report published in 1970:

> "In nearly one hundred years of development, state water law has achieved a reasonable certainty of results which has permitted substantial public and private development in the west. While sometimes necessarily complex, the state administrative and judicial procedures have provided a means to determine security of rights to the use of water." Public Land Law Review Commission, *One Third of the Nation's Land* 142 (1970).

However, unquantified and indefinite federal claims to unappropriated water for use on federal reservations under the so-called "implied reservation doctrine," have served to becloud the status of state created water rights so that the continued orderly planning and development of western resources is threatened.

The reservation doctrine is based on the premise that the Western States did not acquire title to the public lands when they were admitted to the Union and, therefore, as to lands which have not been disposed of by the United States, the federal government is still the owner. Therefore, the federal government claims a right to dispose and regulate the use of the retained public domain lands and waters pursuant to the Property Clause of the Constitution. U. S. Const. Art. IV § 3(2). In exercising this power, the government may dispose of the land and water together or the land and water separately. The



federal government did not dispose of its ownership rights to such waters by the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. 661 (1938), the Act of July 9, 1870, 16 Stat. 217, 43 U.S.C. 661 (1938), or the Desert Land Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. 321, 323 (1958), but merely chose to thereby defer control over the western waters to the states. If the United States withdraws a portion of the public lands for a federal purpose and if at the same time the government intends to reserve unappropriated water for that purpose, then the states' authority to control this water is revoked. In the words of one leading authority in explaining the doctrine:

> "An appropriator complying with state law cannot obtain title to it and his right applies only to the surplus water, if any, remaining after the federal right is satisfied. The reserved water so withheld is the property of the United States, and the government exercising its proprietary powers and rights can put it to use without complying with state law. The block of water that will ultimately be needed on the reserved lands may be used in the meantime by an appropriator who complies with state law, but if that water is later put to use by the government, it takes no property from the temporary user and owes him no compensation." F. J. Trelease, *Federal-State Relations in Water Law* 114 (1973).

Thus the doctrine poses the threat that new federal uses will be given turn-of-the-century priorities that can take water from currently valuable uses established pursuant to state law without paying any compensation. The concern with which the *amici* as Western States view this threat is obvious by the fact that

as a result of federal reservations and withdrawals from those lands open to public settlement, as of June 30, 1963, approximately 40% of the total acreage within those states (with the exception of North and South Dakota) included in the Desert Land Act is under the responsibility of federal agencies: a total of 360,789,045 acres in the 11 contiguous Western States. Note, *Western Water and the Reservation Theory—The Need For a Water Rights Settlement Act,* 26 Mont. L. Rev. 204-5 (1965). Approximately 61% of the total surface water runoff is derived from federally reserved lands. Public Land Law Review Commission, *One-Third of the Nation's Land* 141 (1970). It should be thus apparent that the uncertainties generated by the doctrine with respect to state granted water rights have adversely affected water resources planning and development. As the National Water Commission concluded in 1973:

> ". . . the reservation doctrine frustrates sound planning in the public and private sectors of the economy. The prospective claims of the government are highly uncertain as to time, manner and quantity of use. Consequently, no planner or investor can establish a meaningful water budget. It is impossible to prove how many non-federal projects were not undertaken because of these uncertainties, but statements to the Commission reveal profound concern on the part of state officials." National Water Commission, *Water Policies for the Future* 467 (1973).

Part of the uncertainties involved with the doctrine stems from the fact that there have been relatively few



cases dealing with the doctrine. Many issues concerning the scope of the doctrine remain unresolved. Thus, according to the exhaustive legal study prepared for the Public Land Law Review Commission, the following issues, among others, remain undecided:

> "(1) the detailed nature of the showing required to establish an implied intent to reserve waters upon the creation of a reservation.
>
> (2) The nature and scope of the permissible purposes for the use of water that may be deemed to be within the implied intent on establishment of the reservation;" C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 136 (1969).

To the study's list should be added the question of whether the reservation doctrine applies to groundwater as well as surface water, and if so does the reservation doctrine apply only to groundwater under the reserved lands or does it encompass groundwater under adjoining lands. Note, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West,* 1973 Utah L. Rev. 43-54.

No cases have been decided since the publication of the Public Land Law Review Commission study in 1969 which deal with the above questions. However, each of the above issues is involved in the Ninth Circuit's decision. Despite expressed Congressional intentions and prior executive branch determinations to the contrary, the Ninth Circuit concluded that Congress impliedly intended to vest the President with the authority to reserve water as distinct from

land under the Act for the Preservation of American Antiquities (Act of June 8, 1906, Ch. 3060, 34 Stat. 225, now 16 U.S.C. §§ 431-433) and furthermore, that one of the permissible purposes for the use of water for withdrawals under this Act is the preservation of an endangered species of desert pupfish. The court also held that the reservation doctrine applies to groundwater and that the President intended to reserve sufficient groundwater in Devil's Hole to preserve the pupfish. Therefore, the government was entitled to enjoin an adjacent landowner from pumping water underneath his land pursuant to subsequently granted state well permits to the extent that such pumping lowered the level of the water in the Hole and thus jeopardized the pupfish. Finally, the court in essence allowed the federal government to ignore with impunity determinations as to its reserved rights claims made in a state administrative proceeding in which it participated and from which it failed to appeal.

By thus resolving the above issues in favor of the government, the Ninth Circuit court would significantly expand the extent to which the reservation doctrine may be used to preempt state control over water resources. The *amici* thus feel compelled to advise this Court of their position in favor of the State of Nevada's petition for writ of *certiorari* to review the Ninth Circuit decision.



## II. QUESTIONS PRESENTED

This brief is confined to the following issues which the *amici* consider to be the most crucial to their interests:

(1) Whether Congress intended under the Act for the Preservation of American Antiquities to vest the President with authority to reserve water for the purpose of protecting an endangered species.

(2) Whether the federal government can invoke the "reservation doctrine" to assert superior rights to groundwater so as to enjoin a landowner, adjacent to the federal lands, from pumping water from beneath his land pursuant to state granted well permits.

(3) Whether the federal government should be barred under the principles of *res judicata* from seeking to adjudicate in a subsequent judicial action issues decided in an administrative proceeding in which it participated to determine a water rights application before the State Engineer from whose order the government failed to appeal.

---

## III. ARGUMENT

### A. ASSUMING, ARGUENDO, THAT HE INTENDED TO DO SO, PRESIDENT TRUMAN DID NOT HAVE AUTHORITY UNDER THE ACT FOR THE PRESERVATION OF AMERICAN ANTIQUITIES TO RESERVE WATERS ON LANDS WITHDRAWN PURSUANT TO THE ACT FOR THE PURPOSE OF PROTECTING AN ENDANGERED SPECIES OF DESERT PUPFISH.

As previously noted, the question of the showing required to establish an implied intent to reserve waters upon the creation of a reservation has not

been decided. Nevertheless, government attorneys have consistently advanced a very broad construction of the doctrine's scope to the effect that reservation of all of the unappropriated waters which are appurtenant to the lands is created automatically as a matter of law concomitant with the withdrawal of lands. *E.g.,* Record at 12,440-41, 12,444, *Arizona v. California,* 376 U.S. 340 (1964). Counsel for the United States in its brief before the lower court also advanced this proposition in the following language:

> "In all cases, the test to be applied to determine the existence of federal reserved water rights is whether the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."

Thus it is suggested that the mere act of withdrawal automatically results in the reservation of unappropriated waters for the purposes of the reservation.

The effect of this broad construction of the doctrine can be demonstrated by applying it to the general executive withdrawal orders of 1934-35, whereunder all of the vacant, unappropriated public lands of the United States were withdrawn for the purposes of classification under Section 7 of the Taylor Grazing Act, act of June 18, 1934, ch. 865, 48 Stat. 1269, 43 U.S.C. 315 (1964). Exec. Order No. 6190, Nov. 26, 1934, 54 I.D. 539 (1934); Exec. Order No. 6964, Feb. 5, 1935, 55 I.D. 188 (1935). If the government's proposition were accepted, then subsequent to the issuance of these orders, all of the unappropriated waters on the public lands of the country became thereby subject to a federal claim for the purpose of



administering the Taylor Grazing Act. Examination of the rationale behind the reservation doctrine and careful analysis of the statutory authority for the 1934 and 1935 executive withdrawals discloses, however, that these withdrawals did not involve the implied reservation doctrine for waters contained thereon.

The application of the reservation doctrine is dependent on the assumption that the government intended to reserve unappropriated water for the reserved land. Thus, in the landmark case of *Winters v. United States,* 207 U.S. 564 (1908), this Court ruled that Congress must have intended to reserve rights to water for lands that it set aside by treaty for an Indian reservation, even though it did not expressly provide for them. This intention to reserve water was implied on the basis that it would be unconscionable for the United States to have induced Indians onto a reservation, where they were to settle and develop an agricultural economy without supplying them an adequate supply of water for agricultural and related purposes. However, the special circumstances that may justify an implication of intent to reserve water for the Indians—treaties attempting to convert the Indians from a nomadic to a pastoral life, the doctrine that agreements with Indians are to be construed in favor of the Indians, and the fear that the Indians could not compete with the more advanced non-Indians in acquiring the water and putting it to beneficial use—are not present with respect to other federal establishments. Note, *Water in the Woods: The Reserved Rights Doctrine and*

*National Forest Lands,* 20 Stan. L. Rev. 1187, 1188 (1968). A significantly greater showing of an intention to reserve waters for non-Indian lands as opposed to Indian lands should therefore be required. If this intention is not expressed in the legislation or order authorizing the withdrawal, or if it is not clearly implied from the authorization, then the government should not be deemed to have reserved rights.

Under the above test, it is clear that the general executive withdrawals of 1934 and 1935 pursuant to the Taylor Grazing Act of 1934, supra, are not entitled to reserve water rights. The 1934 withdrawal, which embraced all of the Western States, declared that it was "necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain . . . for the purpose of effective administration of the provisions of [The Taylor Grazing Act of 1934]." Exec. Order No. 6190, Nov. 26, 1934, 54 I.D. 539 (1934). Nothing in the withdrawal order directly refers to any intention to reserve water on the public domain. Nevertheless, such an intent could conceivably be implied from the reference to the purposes of the Taylor Act "for conservation and development of natural resources." C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 243 (1969). However, the Taylor Act clearly disclaims any authority thereunder to impair state water rights. Thus, it states:

> "Provided further, that nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which have heretofore vested or accrued under existing law validly affecting public lands or which may hereafter be initiated and maintained in accordance with such law. . . ." 43 U.S.C. § 315 b (1964).



In view of this disclaimer, it cannot be reasonably argued that the President was entitled to reserve water rights in connection with the lands withdrawn in 1934 and 1935 to administer the Taylor Grazing Act.

Such an analysis of the statutory authority for each withdrawal must be made in order to determine the government's reserved rights claims. It is the position of the *amici* that such an examination of the Act for the Preservation of American Antiquities under which President Truman withdrew the 40 acre tract of land containing Devil's Hole, and the Act's statutory background and subsequent executive interpretation clearly discloses that the President also had no authority to reserve waters thereunder for the purpose of protecting an endangered species of desert pupfish, and that the lower court erred in concluding otherwise.

The Act for the Preservation of American Antiquities passed in 1906 vested the President of the United States with authority to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . ." and to reserve parcels of land as national monuments "the limits of which in all cases

shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 34 Stat. 225, 16 U.S.C. §§ 431-33. There is no evidence whatsoever in the language of the Act to intimate that the President was vested with authority to reserve water as distinct from "parcels of land." Furthermore, the purpose of the Act was to preserve American antiquities of historic and scientific interest. There is absolutely no indication that the Congress intended to vest the executive with authority to make reservations under the Act for the purpose of conservation of wildlife. Indeed, the House Report on the 1906 Act negates any notion of such an intention. It provides that "[t]he bill proposes to create small reservations reserving *only so much land* as may be absolutely necessary for the preservation of those interesting relics of prehistoric times." (Emphasis added). H. R. Rep. No. 2224, 59th Cong., 1st Sess.

The Ninth Circuit accepted the government's argument that Section 1 of the National Park Service Act of 1916 supports the conclusion that a fundamental purpose of national monuments is to preserve wildlife. The National Park Service Act established the National Park Service to promote and regulate the use of national parks and monuments "by such means and measures as conform to the fundamental purpose of said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and wildlife therein and to provide for the enjoyment of the same by such manner and such means as will leave them unimpaired



for the enjoyment of future generations." 39 Stat. 535, 16 U.S.C. § 1.

It is submitted that this language is of little or no relevance in determining the purposes of the 1906 Act in question. It is a general provision establishing a new agency with duties that would include the operation of national parks, national monuments, and national historic areas, each having a distinct public purpose warranting protection. The language set forth above was merely a summary of these separate purposes. Moreover, whatever the purposes of national monuments, there is no evidence in the National Parks Service Act to support the government's contention as to the basic issue in this case; whether the President was authorized under the Act for the Preservation of American Antiquities to reserve water as distinct from land for the purpose of protecting an endangered species. Indeed, in addition to the legislative history of the Act for the Preservation of American Antiquities set forth above, the history of the National Parks Services' administration of the national monuments, subsequent Congressional appropriations for the National Parks Service, and finally, a Solicitor General's opinion, make apparent that the President had no such authority.

The National Parks Service, which has jurisdiction over Death Valley National Monument and therefore Devil's Hole, has for some time followed the policy that the Parks Service should adhere religiously to state law with respect to the establishment and maintenance of water rights for use on lands under their

jurisdiction. C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 310 (1969). Thus, the following statements were contained in a proposed chapter for a Parks Service handbook:

> "It is particularly important [for Superintendents] to check with the State Engineer, State Water Board or other proper state authority to determine whether a license or permit is required before a well is started." National Park Service, Resources Management Handbook, proposed Ch. 8, § 3 at 4 (Sept. 1967).
>
> "Where other [water] rights are senior, Superintendents must always respect the prior rights. The need for following these practices arises in connection with the use of water to fill water holes and troughs for wildlife and to store water for domestic and other purposes. It is also good policy to always take water during hours, days, or other periods of comparative plenty. Adherence to this policy often promotes good will and cooperation and can avoid embarrassment in situations in which the Parks' rights are junior to other rights outside the boundaries of the Parks." *Id.* § 3 at 5.

Not only does the proposed chapter on water rights for the Park Services handbook emphasize the importance of compliance with state law, but more importantly no reference is ever made to the reservation doctrine and its potential effect upon water rights acquired under state law. C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 311 (1969).



Language of a Congressional act of 1946 also clearly demonstrates that Congress as well contemplated that water rights on Park Service lands were to be acquired by the Service pursuant to state law. It provides as follows:

> Appropriations for the National Parks Service are authorized for—
>
> . . . .
>
> *(G) Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts.* Including the acquisition of water rights or of lands or of interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments. Act of Aug. 7, 1946, Ch. 788, 60 Stat. 885 (emphasis added).

Note that there is no mention, or even inference, in the statutory provision that acquiring water rights pursuant to state law was being done as a matter of comity on the theory that the withdrawal of the lands reserved all water rights not then validly appropriated.

But perhaps the most telling evidence that Congress did not intend by either the Act for the Preservation of American Antiquities or the National Parks Service Act to vest the executive with power to reserve water on or adjacent to national monument lands for the purpose of preserving aquatic life, is an opinion issued subsequent to both Acts by the Solicitor General for the Department of the Interior. *Use of National Monument Lands for Fish Hatchery*

*Purposes,* 51 I.D. 497 (1926). The question submitted to the Solicitor General was whether there was legal authority for granting a request of the State of Arizona for permission to construct and operate a fish hatchery in the Papago Saguaro National Monument for the purpose of restocking streams and lakes located within the state. After citing the National Parks Service Act, and noting the arid nature of the National Monument, the Solicitor concluded that "it could not be contended that the primary purpose of a hatchery so located would be to subserve, maintain, or develop the reservation in harmony with the purpose for which it was established. . . ." At the same time, the court distinguished an arrangement with the State of California whereby the state was permitted to install a fish hatchery in the Yosemite *National Park,* noting that it was in line with the purposes of that reservation. It is also instructive to note that, although the opinion dealt with Papago Saguaro National Monument, it was entitled "Use of National Monument Lands for Fish-Hatchery Purposes." Moreover, the extremely arid nature of Death Valley National Monument is well known. Surely under the reasoning of the Solicitor's opinion therefore, it also cannot be contended that the addition of 40 acres of land and sufficient groundwater to preserve an endangered species of desert pupfish is in harmony with the purposes for which Death Valley National Monument was established pursuant to the Act for the Preservation of American Antiquities.

In conclusion, assuming, *arguendo,* that the President intended by the Presidential Proclamation of



1952 to reserve water as well as land for the preservation of an endangered species of pupfish, it is clear that he had no authority to do so under the Act for the Preservation of American Antiquities upon which he relied, or any subsequent Congressional act or authorization. The lower court's erroneous conclusion to the contrary presents not only an ominous threat to state granted water rights in waters on or adjacent to the vast national monuments in the West, but also to waters on or adjacent to other reservations where it is likewise evident that Congress did not intend to reserve water for reservation purposes as distinct from land. The *amici* therefore urge this Court to review the Ninth Circuit's decision.

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### B. THE RESERVATION DOCTRINE SHOULD NOT BE EXTENDED TO APPLY TO PERCOLATING GROUNDWATER SO THAT THE GOVERNMENT IS ENTITLED TO ENJOIN AN ADJACENT LANDOWNER FROM PUMPING WATER FROM BENEATH HIS LAND PURSUANT TO STATE GRANTED RIGHTS.

Despite suggestions in the lower court's opinion to the contrary, neither of the two cases that have dealt with the reservation doctrine in deciding groundwater rights constitute firm precedent for the lower court's holding. The first case was *State ex rel. Shamberger v. United States,* 165 F.Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960), in which the Nevada Federal District Court held that the federal government could use underground waters located under a Naval Depot without obtaining a permit from the state. The court relied on this Court's decision in *Federal Power Commission v. Oregon,*

349 U.S. 435 (1955) in reasoning that since the United States possessed both ownership and control of the land within the scope of its delegated functions under the War Power, it enjoyed a superior position under the Supremacy Clause and state laws need not be observed. However, the significance of *Shamberger* in regard to the present case is, at best, very limited. In the first place the court was not dealing with federal claims to reserved groundwater rights as against private uses adjacent to the reserved property. Secondly, the Ninth Circuit Court on appeal directed that the case be dismissed because the District Court was without jurisdiction. Under such circumstances, the holding in *Shamberger* does not rise to the level of obiter dictum and thus has no value as a precedent applicable in deciding the issues in the instant case.

The case of *Tweedy v. Texas Company,* 286 F.Supp. 383 (D. Mont. 1968), also referred to the reservation doctrine with respect to percolating water. The owners of land within an Indian reservation brought an action for damages against the holder of an oil and gas lease for all groundwater drawn by the lessees and used in the extraction of oil. The plaintiff claimed that he had rights to the groundwater as an incident of ownership of land. The court noted that the reservation of waters for the Indian lands would apply both to surface or underground water. This statement, however, was completely gratuitous in view of the court's decision against the plaintiff on the basis that it had failed to show any damage caused by the defendant's use. Furthermore, the issue of whether



the owner of federal reserved water rights may prevent the use of water by adjacent private parties in order to protect its own underground water supply was also not before the court in *Tweedy.* Thus, the language in *Shamberger* and the dictum in *Tweedy* were in no way dispositive of the issues before the Ninth Circuit in the present case. Moreover, the rationale for the reservation doctrine—the implied intent of Congress to provide water for the purposes of the reservation—does not support an extension of the doctrine to percolating groundwaters.

Surface water flowing through or by reserved lands should have been apparent to Congress at the time of the withdrawal; thus, it can be reasonably asserted under the proper circumstances that Congress had "impliedly" reserved the surface water for use on reserved lands. In the case of groundwater however, the existence, extent, and flow of groundwaters underneath reserved lands could not have been apparent to Congress, and it is therefore unreasonable to impute to Congress an intent to reserve such waters. Note, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West,* 1973 Utah L. Rev. 43.

There is also another fundamental difference between surface and percolating waters. Since surface water moves rapidly over a stream bed, an upstream diversion can affect the downstream user within a matter of hours. Percolating water, on the other hand, moves very gradually through no defined channel and because of false non-porous materials and

other natural factors, it is often impossible to predict the effect of the drawing of groundwaters on other water supplies. Thus, a groundwater user adjacent to a reservation can pump water for years before the total effect is known. By that time, he could have made a substantial investment in the land and water use. Under such circumstances, application of the reservation doctrine with its no compensation feature would be unconscionable. *Id.*

Groundwater is a significant resource in the United States. In 1963 one fifth of the nation's water needs were met from underground sources and this proportion is projected to reach one half in the near future. Comment, *Appropriation and Colorado's Groundwater: A Continuing Dilemma,* U. Col. L. Rev. 133, 134-35 (1967). It is not known to what extent groundwater supplies are derived from federally reserved lands. However, the amount will probably parallel surface water in percentages. Note, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West,* 1973 Utah L. Rev. 43, 46. Realizing the importance of this resource, most Western States have enacted comprehensive statutes governing groundwater use. Applying the reservation doctrine as did the Ninth Circuit precludes state control under these statutes over the use of underground water under both the reserved land and adjacent non-reserved land to the extent deemed necessary to fulfill the purposes of the reservation. Moreover, since it is nearly impossible to predict the extent and flow of groundwaters, state administrators, as a



result of such a decision, could well become reluctant to issue any permits for the drilling of wells in the general vicinity of reserved lands in anticipation that the government could at some point in the future successfully assert a right to the same groundwater. In view of the percentage of western lands in federal ownership such a result would significantly impair the efforts of the Western States under their groundwater statutes to control the use of groundwater and to afford security in its use through state granted permits.

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### C. THE UNITED STATES IS BARRED UNDER THE PRINCIPLES OF COLLATERAL ESTOPPEL FROM INITIATING A COURT ACTION TO ADJUDICATE ISSUES DECIDED IN A PRIOR STATE ADMINISTRATIVE PROCEEDING IN WHICH IT PARTICIPATED, BUT FROM WHICH IT FAILED TO APPEAL.

This Court in *United States v. District Court of Eagle County,* 401 U.S. 520 (1971), established that federally reserved water right claims may be adjudicated within the framework of state statutory schemes. The United States cannot reasonably contend that the state did not have jurisdiction in the prior administrative proceeding by raising the doctrine of sovereign immunity since that doctrine is simply not applicable to the facts of this case. The doctrine provides that the government cannot be sued in its own courts, or in any other, without its consent. Here, the government was not sued, but instead intervened in the proceeding of its own volition to present its case against granting the defendant's application. As this Court stated in an analogous situation:

> "There is no merit to the suggestion that the United States, in presenting its claim in the state proceeding, would be compelled to take the position of a defendant,—being sued without its consent. In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant."

Thus, the Nevada State Engineer in the administrative proceeding was competent to render a decision binding on all parties as to all matters affecting the defendant's application including the question of a conflicting federally reserved right.

Issues that were or could have been adjudicated in an administrative proceeding have been held barred from being litigated in a subsequent court action, especially where, as here, the determinations are made for a purpose similar to that of a court and in proceedings similar to judicial proceedings. *E.g., Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943); *United States v. Utah Construction Co.,* 384 U.S. 394 (1966); *United States v. William Tablet Co.,* 141 F.2d 141 (7th Cir. 1944). This principle of collateral estoppel has been held applicable even though the aggrieved party fails to appeal the administrative decision. *Paramount Transport System v. Chauffeurs, Teamsters and Helpers, Local 150 et al.,* 436 F.2d 1064 (9th Cir. 1971). For the purpose of the rule of collateral estoppel or *res judicata,* "parties" barred under the rule are not merely those who are named as such in the record and properly served with process, but includes persons who have a direct interest



in the subject matter of the action and have a right to control the proceedings, defend, examine witnesses, and appeal if an appeal lies. *E.g., Vane v. Haffberger Co.,* 196 Md. 450, 77 A.2d 152 (1950).

The above rules have been held applicable to reserved rights claims of the United States. In the case of *In re Green River Adjudication v. United States,* 404 P.2d 251 (Utah 1965), the court held that since the United States had become a party and had asserted its water rights claims in the adjudicatory proceeding, the court had jurisdiction of the subject matter and the parties, and any determination with regard to the water rights of the United States was therefore *res judicata* as to "any water rights which have been or could have been claimed within the adjudication. . . ." *Id.* at 252. This included the claims for additional reserved rights asserted by the government. The court stated that "if the rule were otherwise, the government through its agents, could be wholly arbitrary about asserting water rights, if and when, it pleased." *Id.* at 252.

It is submitted that under the above principles the United States is estopped from asserting in this case reserved rights claims determined in the prior state administrative proceeding. Prior to the administrative hearing, the United States filed written protests on the basis that the pumping of the wells would adversely affect the water in Devil's Hole and thus result in harm to the fish living in the pool. This objection was reiterated in detail at the hearing before the State Engineer. President Truman's procla-

mation and expert testimony on the hydrology of the Ash Meadow area were introduced by the government. The nature, value and extent of the competing interests of the federal government and adjacent land owners was thoroughly argued during the hearing. As the transcript reveals, the issue of the lowering of the water in Devil's Hole and the effect on the fish therein was thoroughly considered. Although the federal government did not specifically assert an implied reserved water right, the existence of a federal water right was considered, but it was concluded that one did not exist. After the State Engineer rendered his decision granting the applications, all parties were informed that they had thirty days in which to appeal. The United States did not appeal. Approximately six months later the government filed its complaint in this case in the Federal District Court. Allowing the government to thus initiate a judicial action six months subsequent to the administrative determination and after a substantial investment by the individual defendant in reliance upon the administrative decision is to clearly violate the principles of collateral estoppel and to make meaningless the administrative order of the State Engineer.

From the earliest times, water law has been state law. The states have systems of water law and procedures adapted to water supply, climate, and demand. The United States does not. The initial forum, therefore, to achieve coordination and accommodation of federal uses with state and private uses is properly the state court, or in the case of Nevada, the admin-



istrative adjudication procedure which substitutes in the first instance in place of a court the State Engineer, expert in the area of water use, and from whose order an aggrieved party may appeal to the state courts. The opinion of this Court in the *Eagle County* case, *supra,* supports this position. Furthermore, this Court there set forth the proper method by which the federal government could obtain review of the state determinations as to its reserved rights claims:

> "*All such questions,* including the volume and scope of a particular reserved right, are federal questions, which, *if preserved,* can be reviewed here after *final* judgment by a Colorado Court." (Emphasis added).

It is submitted that the proper remedy of the United States in this case was to appeal the decision rendered in the administrative proceeding to determine the individual defendant's water right application. Holding otherwise, as did the Ninth Circuit, allows the government to have a second independent review of its reserved rights claims in disregard of prior determinations under state laws and procedures. Such a decision can only exacerbate the uncertainties to which the reservation doctrine already subjects state created water rights in the West.

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## IV. CONCLUSION

Despite government contentions to the contrary, it should be pointed out in conclusion that this case does not involve the survival of the Devil's Hole pup-

fish. As pointed out by a leading authority on the reservation doctrine:

> ". . . [T]he reservation doctrine adds nothing to the power of the United States to take and use the water it needs for any constitutional purpose or power. If a constitutionally enacted statute gives an agency of the United States the power to perform a federal function on any federal land in any state, whether public land, reservation or acquired land, and that function requires the use of water, no state's law can block or limit the use of water or acquisition of a water right. No theory of federal ownership or reservation is required. The only difference resulting from reliance on the reservation doctrine instead of on a more basic federal power is that in some cases where the water is taken from persons who have previously put it to use the United States need not pay for the taking. The reservation doctrine is a financial doctrine and nothing more." F. J. Trelease, *Federal-State Relations in Water Law* 147 M (1971).

Thus, if the United States determined that the condemnation of the defendant's water rights was necessary in order to preserve the Devil's Hole pupfish, it would have ample power to do so under the Endangered Species Act, which empowers the Secretary of the Interior in carrying out the program "to acquire by purchase, donation or otherwise, lands, waters or interests therein . . ." 16 U.S.C. Section 1534. Nevada law could not block or limit that acquisition. No reliance on the reservation doctrine would be required. Instead, the government chose to rely on reserved rights claims in the hope that it could avoid paying compensation for the destruction



of the defendant's water rights. Such was clearly not the result intended by Congress when it passed legislation specifically designed to protect endangered species. Act of October 15, 1966, P. L. 89-669, 80 Stat. 926, 16 U.S.C. 668 dd(i); Act of December 5, 1969, P. L. 91-135, 83 Stat. 275; Act of December 28, 1973, P. L. 93-205, 87 Stat. 884, 16 U.S.C. §§1531-1543. Although twice amended since its original enactment in 1966, the Act has always provided as follows: "Nothing in this Act shall constitute an expressed or implied claim on the part of the federal government as to exemption to state water laws." 16 U.S.C. Section 668 dd(i).

If the Ninth Circuit decision is allowed to stand, it will mean that the federal government has succeeded in asserting reserved rights on national monument lands for a purpose which was not intended by Congress in the legislation providing for such withdrawals, and indeed, which Congress has declared shall not entail reserved rights claims exempt from state water laws. Furthermore, the Ninth Circuit's decision will be authority for the proposition that the reservation doctrine applies to percolating groundwaters, a conclusion which is inconsistent with the rationale behind the doctrine, and which could significantly exacerbate the uncertainties generated by the doctrine with respect to state granted water rights in the West. Finally, the Ninth Circuit's decision will mean that the federal government, contrary to the guidelines set down by this Court in the *Eagle County* case, was able to obtain a second independent review of its reserved rights claims in disregard of the de-

terminations of an earlier state administrative proceeding in which it participated and from which it failed to appeal. In view of these implications with respect to state water laws and procedures, the *amici* urge this Court to review the Ninth Circuit's decision in this case.

May 1975

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No. 74-1304

# In the Supreme Court of the United States

OCTOBER TERM, 1974

STATE OF NEVADA EX REL. ROLAND D. WESTERGARD, STATE ENGINEER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner, the State of Nevada, seeks review of the same decision by the United States Court of Appeals for the Ninth Circuit that is the subject of the pending petition in *Cappaert* v. *United States,* No. 74-1107.[1] We are serving on petitioner a copy of our brief in opposition in *Cappaert*.

The essential facts of the case are as follows. In 1952, by Presidential Proclamation "a remarkable underground pool known as Devil's Hole * * *" and the 40 acres surrounding it were withdrawn from the public domain and established as a detached portion of Death Valley National Monument. The pool is the sole natural habitat

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[1]On May 19, 1975, the Court granted the motion of petitioners in No. 74-1107 to defer consideration of their petition.

of a "peculiar race of desert fish * * * found nowhere else in the world" known as pupfish (Cyprinodon diabolis).[2]

In 1968, the Cappaerts, who had acquired nearby land, began substantial groundwater pumping to support a new ranching venture.[3] The water pumped from the Cappaerts' wells is from the same underground formation that supplies water to Devil's Hole; consequently, the water level in Devils Hole began to recede and the pupfish population declined precipitously.

In 1971, after an unsuccessful protest to the State Engineer (Pet. App. A, xv) against the issuance of pumping permits to the Cappaerts, the United States initiated this action to enjoin the Cappaerts from exercising their permits in a manner that would threaten the fish life of the pool. The State of Nevada, which was permitted to intervene as a defendant, argued, *inter alia*, that (1) the United States had no water rights to the underground water involved in this suit, (2) the McCarran Amendment (66 Stat. 560, 43 U.S.C. 666) divested the federal courts of jurisdiction to entertain suits concerning water rights claimed by the United States, and (3) the decision by the Nevada State Engineer to grant permits to the Cappaerts to pump groundwater was *res judicata* and barred this action.

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[2]See our brief in *Cappaert*, at p. 2. The quotations are from the Presidential Proclamation, which is reproduced in the separate appendix to the petition in *Cappaert*, at App. C, C-1 to C-3.

[3]The Cappaerts' land acquisitions are outlined in their petition (No. 74-1107); they acquired much of the land from the United States after the creation of the Devil's Hole National Monument. The court of appeals properly rejected their argument that the acquisitions from the United States estopped the United States from contesting their use of water and gave them the right to pump water without limitation (Pet. App. A (No. 74-1304), xi-xii).



The district court, finding that the United States held a water right superior to that of the Cappaerts,[4] entered a preliminary injunction directing the Cappaerts to curtail their pumping sufficiently to assure an adequate water level in Devil's Hole for the preservation of the fish. On appeal, the court of appeals, with the concurrence of the parties, remanded the case to the district court for entry of a final order. After entry of the order making the injunction permanent, the court of appeals affirmed (Pet. App. A), but directed the district court to retain continuing jurisdiction to determine the precise water level required to ensure survival of the fish.

1. Petitioner contends that the decisions of the district court and court of appeals present novel and important questions of water law. However, as the opinion below demonstrates, and as we pointed out in our brief in opposition in *Cappaert*, there are no such questions at issue. It is well established that the United States may, by withdrawal of public lands, reserve such appurtenant unappropriated waters as are required to accomplish the purpose for which the lands are withdrawn. Such federal reserved water rights may be found in conjunction with the reservation of lands by Act of Congress or Executive Order and for any appropriate federal purpose. *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, 522-523; *Arizona* v. *California*, 373 U.S. 546, 597-601; *Winters* v. *United States*, 207 U.S. 564. A state water permit is not required to perfect this federal right. *Eagle County, supra,* 401 U.S. at

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[4]The courts below found that the Cappaerts' use of water for the ranch in question began in 1968 and that under Nevada law their water right had priority only over water rights established after that time. The courts found that the federal right dated from the establishment of the National Monument in 1952 (Pet. App. A, x-xi, xiii).

523; *Arizona* v. *California, supra*, 373 U.S. at 597-598; *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 447-448; *United States* v. *Walker River Irr. Dist.*, 104 F.2d 334, 336 (C.A. 9).

The district court and the court of appeals correctly found that in establishing Devil's Hole as a national monument, President Truman intended to preserve the pool, and that the effect of the reservation was thus to reserve the then unappropriated water rights necessary for this purpose. This case thus does not present the question framed by petitioner (Pet. 3), that is, whether *every* federal reservation of land formerly in the public domain reserves a water right. The only question is whether this reservation, concerned with preserving a unique pool of water and specimen of fish, reserved such a right.

Petitioner further contends (Pet. 6-7, 12-13) that the decision below departs from precedent in that the reserved water right at issue here was not based upon "need". The courts below found that the water at issue was needed to accomplish the purposes for which Devil's Hole was reserved, that is, the preservation of the unique fish that live in it (Pet. App. A, iv-viii, xiii). Thus the existence of a federal water right not based on "need" is not an issue presented by this case.

2. Petitioner apparently asserts here (Pet. 14-19), as it did in the court of appeals, that the McCarran Amendment and this Court's decision in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527, divest the United States district courts of the jurisdiction granted by 28 U.S.C. 1345 to entertain actions brought by the United States to establish and protect its water rights. The court of appeals correctly rejected this contention (Pet. App. A, xiii-xiv),



holding that the McCarran Amendment is simply a waiver of sovereign immunity permitting the United States to be joined as a defendant in general water adjudications, whether in state or federal courts, but does not divest federal district courts of jurisdiction they otherwise have.

Moreover, the instant case is not a general water adjudication, but an action by one water user (the United States) to enjoin an encroaching use by another (the Cappaerts). As such it is not covered by the McCarran Amendment. See *Dugan* v. *Rank*, 372 U.S. 609, 617-618; see also Pet. App. A, xv-xvii.[5]

3. Petitioner finally argues (Pet. 4-5, 14-19) that the court of appeals should have found the United States' action barred by the doctrine of *res judicata* because the National Park Service, in a proceeding before the State Engineer, protested the Cappaerts' application for a state permit to pump certain wells.[6] The court of appeals properly rejected that contention (Pet. App. A, xv-xvi).

The proceeding before the State Engineer was on an application by the Cappaerts for a permit to pump certain quantities of water from their wells. The United States

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[5]We note in this respect that the Court has granted writs of certiorari in *Colorado River Water Conservation District, et al.* v. *United States*, No. 74-940, certiorari granted April 28, 1975, and *Mary Akin, et al.* v. *United States*, No. 74-949, certiorari granted April 28, 1975. Those cases are concerned with the question of abstention by a federal court in a general stream adjudication. They do not concern the role of the federal court in an injunction suit between two parties nor the substantive rights at issue here. Accordingly, the grant of certiorari in those cases does not call for review here.

[6]Petitioner incorrectly states that the United States was represented at the state protest hearing "through counsel from the Solicitor-General's office" (Pet. 4). In fact, as the court below correctly noted (Pet. App. A, xv), the protest was made by a field solicitor of the United States Department of the Interior.

was not made a party to the proceeding, but the Park Service presented evidence against the permits, showing that studies were being undertaken to determine the effect of additional pumping on the water level at Devil's Hole and that no additional pumping permits should be issued pending completion of the study (*ibid.*; see also R. 353-438).[7] The State Engineer declined to delay issuing the permits. In so doing he stated that it had not been shown that the additional pumping would unreasonably lower the water table or be contrary to the public interest, which the Engineer defined in terms of local economic development (R. 434, 435-436). The Engineer found that "no record of a water right on Devil's Hole" had been presented to him (R. 434) and for purposes of his decision he assumed there was no such right but issued the permits "subject to existing rights" (R. 436).

The court of appeals was correct in stating (Pet. App. A, xvi) that the State Engineer in this proceeding "did not have the authority to adjudicate the water rights of the United States." Moreover, the State Engineer did not purport to hear evidence on or to adjudicate those rights.[8] Six months later, when the actual result of the

[7]"R." refers to the record in the court of appeals. The transcript of the hearing before the State Engineer was made part of that record.

[8]Nevada law requires that a person obtain a permit from the Nevada State Engineer before withdrawing public waters, Nev. R.S. 533.325 and 534.050. Interested parties may file protests to such permit applications, Nev. R.S. 533.365, and permit applications may be rejected on the grounds that issuance of the permit is "detrimental to the public welfare," Nev. R.S. 533.370. But these state permits are issued subject to existing rights, Nev. R.S. 533.430, as was the case here. Adjudications of relative water rights among competing claimants fall under entirely separate and distinct provisions of the Nevada water laws, see Nev. R.S. 533.090-533.320, 534.100. The Cappaerts' state permit thus does not represent the result of an adjudication of water rights between the Cappaerts and the United States.



pumping was evident, the United States properly sought in the federal district court a judicial declaration of its rights and an injunction, not prohibiting all pumping by the Cappaerts, but limiting pumping to the extent necessary to preserve Devil's Hole.

4. *Amici* argue (Arizona Br. 10-18; Hawaii Br. 17-21) that this Court should grant review because the decision below unwarrantedly extends the federal reservation of water rights doctrine to groundwater.[9] However, the rationale in *Winters* v. *United States*, *supra*, and *Arizona* v. *California*, *supra*, is not based on the source of the water but on the fact that the United States, in withdrawing land from the public domain, should be held to have reserved needed water rights along with the land withdrawn.[10] All courts that have considered the question

[9]*Amici* also argue that President Truman did not have authority to reserve these water rights and that the government's case is barred by *res judicata*. These contentions are answered at pp. 3-4 and 5-7, *supra*. As to the first contention, see also our brief in *Cappaert*. Arizona also argues (Br. 10-18) that because it generally allows landowners to extract water without limitation, a reserved right to groundwater would be inconsistent with its laws. The short answer is that the reserved right is a matter of federal law. But we point out that while Arizona has tended to permit unlimited exploitation of groundwater by surface owners, other western states have not. See, for example, *City of Pasadena* v. *City of Alhambra*, 33 Cal. 2d 908, 207 P.2d 17 (Sup. Ct.). See also Nev. R.S. 534.020. And as Arizona points out, it too has moved towards treating groundwater similarly to surface water (Br. 10-12).

[10]Thus in *Arizona* v. *California* this Court stated (373 U.S. at 601):

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

have held the doctrine applicable to groundwater as well as other waters.

Thus in *State of Nevada ex rel. Shamberger* v. *United States*, 165 F. Supp. 600 (D. Nev.), the court held that in withdrawing from the public domain land for a Navy ammunition depot, the government tacitly reserved the right to operate wells on the depot sufficient to satisfy the needs of the depot and that a state permit to do so was not required.[11] Similarly in *Tweedy* v. *Texas Company*, 286 F. Supp. 383 (D. Mont.), the court found that the establishment of the Blackfeet Indian Reservation reserved underground waters to the same extent as surface waters.[12] We know of no case to the contrary. Thus the decision of the court of appeals in applying the reserved rights doctrine to groundwaters in no way established a novel interpretation of law or one conflicting with decisions of other courts.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

JUNE 1975.

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[11]The Court of Appeals for the Ninth Circuit affirmed, 279 F.2d 699, on the ground that the United States had not consented to the suit against it.

[12]The court stated, 286 F. Supp. at 385:

> The *Winters* case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1975.

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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1975
No. 74-1304

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, *et al.*,
*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer,
*Intervenor.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA

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State Engineer,
*Intervenor.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA

### Jurisdictional Statement

This Honorable Court has granted a writ of certiorari pursuant to 28 U.S.C. §1254(1) to review a decision of the United States Court of Appeals for the Ninth Circuit. This brief, Amicus Curiae, is respectfully submitted by the State of California, by and through its Attorney General, at the request of the State Water Resources Control Board and the Colorado River Board of California, pursuant to Rule 42(4) of this Honorable Supreme Court of the United States.

## Preliminary Statement

The State of California has a vital interest in the preservation and development of its economy, an economy dependent in large part on the availability of water, including groundwater. An extension of the *Winters* doctrine to groundwater could greatly affect present expectations and rights to the use of groundwater on which the California economy largely relies. California is, therefore, vitally interested in the outcome of this case.

The State of California is also interested in any statement regarding the *res judicata* issue in this case as it may affect a case presently pending in Federal Court in California. In that case, California is asserting *res judicata* against a United States challenge of the validity of certain findings of a California water agency. California is concerned that an unnecessarily broad statement by this Court on *res judicata* could prejudice its rights in the lower court case.



## ARGUMENT

### I

### The Winters Doctrine Should Not Be Extended to Groundwater, but if It Is, the Intent Requirement Thereof Should Be Strictly Delineated and Applied on a Case-by-Case Basis

There is no question that much of the development of the largely arid Western United States has resulted from and still depends upon the availability of water. Any change in the established system of water use poses a threat to the economy of this area. The *Winters* doctrine of reserved water rights, even as presently limited to surface flows, is a threat simply because of its attendant uncertainty and potential for social and economic dislocation. Federal reservations often have unquantified but potentially limitless claims to surface water with priority dates before established claims under State law. As a result, claimants under State law often have no assurance that their water rights will not be effectively negated by a subsequent Federal reservation claim which will nevertheless be given a priority date as far back as the mid-19th century.

If *Winters*, as presently applied, creates uncertainty, an extension of *Winters* to groundwater could create enormous chaos in the West. In 1963, over one-fifth of the nation's water needs were satisfied by groundwater and the percentage was projected to grow. In the arid West, where surface runoff is limited, irrigation places an ever greater strain on groundwater supplies. (1973 Utah Law Review 43, 46-47.) If *Winters* were extended to groundwater at this late date after years of established groundwater use by State claimants, then not only would the federally reserved lands have a

groundwater right with a priority date dating back perhaps to the last century, but longtime State pumpers on the same groundwater basin but with a later priority date would suddenly have their rights severely prejudiced. In many Western States where Federally reserved lands constitute a major portion of the total area, almost all overlying owners would be affected given the large area covered by many groundwater basins. Furthermore, in states like Arizona and California where appropriative rights to percolating groundwater do not exist for overlying lands, it may be argued that no overlying pumper could have a priority date and all would be inferior to any Federal claims.

These consequences have dictated Amicus State of California's concern in this case. Amicus generally supports the position urged by petitioners that the *Winters* doctrine not be extended to groundwater. If it is, however, Amicus contends that its application in particular cases must be limited by the intent requirement of *Winters*. Such limitation should be delineated by this Court so as to avoid future uncertainty, and it is to this issue that Amicus will now address itself.

This Court may well decide to extend the *Winters* doctrine of reserved water rights to groundwater as well as to surface water. Such an extension, however, should still involve a case-by-case analysis to see whether the requirements of the *Winters* doctrine were met. It is the position of Amicus Curiae, State of California that, a major requirement of *Winters*—implied intent—could not be met in cases involving reservations of land occurring before the 1920's and that this Court should qualify in that way any general extension of the *Winters* doctrine to groundwater.



*Winters v. United States*, 207 U.S. 564 (1907) and its line of cases each involve a reservation of land for government purposes by treaty, Congressional statute, or executive order in which no express reservation of water rights was made. The courts found in each case an implied reservation of the usufructuary right to sufficient surface water to satisfy the purposes, and attendant needs, for which the reservation of land was made. *Winters v. United States, supra; Conrad Investment Company v. United States*, 161 Fed. 829 (9th Cir. 1908); *United States v. Powers*, 305 U.S. 527 (1939); *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *Arizona v. California*, 373 U.S. 546, 601 (1963); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971). Finding such an implied reservation centers around the intent to reserve water that must be attributed to the Federal government in reserving the land. The court in *United States v. Walker River Irrigation District, supra*, in referring to the reservation of lands for the Walker River Indian Reservation, said at page 336:

> "The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved."

The attribution of intent requires the court to find that the Federal government must have had such an unexpressed intent in light of the circumstances, as articulated in the *Walker River* case. In the series of cases finding an implied reservation of water for Indian reservations, consistently similar circumstances allowed

the courts to find an intent to reserve water. These circumstances included the following: a government purpose to facilitate a change in the Indian way of life from nomadic to sedentary and pastoral, involving cultivation of the land and raising of animals; the fact that the land set aside for such purpose was arid but that the contemplated uses nevertheless involved the extensive need for water to irrigate crops, water livestock, and consume domestically; and finally, the presence on the reserved land or along its boundaries of a surface water flow capable of fulfilling its water needs. *Winters v. United States, supra; Conrad Investment Company v. United States, supra; United States v. Powers, supra; United States v. Walker River Irrigation District, supra; United States v. Ahtanum Irrigation District, supra; Arizona v. California, supra.* Under these circumstances, it was not difficult for these courts to conclude that the Federal government must have been aware of the need for water on the reserved lands and therefore must have intended to reserve water from the riparian surface flows for use on those lands.

The same cannot be said about groundwater. The Indian reservations in the above cases were all constituted of lands reserved in the period from 1855 to 1917. During this period, groundwater was not yet looked to as a well-defined, viable, or economical source to meet large demands, such as those of irrigation on these reservations. Geohydrologic knowledge as to the nature, extent, and location of groundwater supply was not yet highly developed. Only when this knowledge increased and technology for the capture of groundwater improved some years after the turn of the century did groundwater play a more important role in water planning and use. The drought of the 1930's dried up



surface water sources and gave more impetus to the development of groundwater. Similarly, World War II demands for water at little expenditure of time, money, and critical materials tended to favor groundwater extraction over the development of surface water sources. Since then, the upward trend in groundwater development has continued. (Joseph L. Sax, *Water Law* (1965), pp. 240-241, quoting from "Water Supply Paper 1800," pp. 23-28, 77-78, 110-111 (1963), U.S. Geological Survey.)

Since groundwater was not looked to as well-defined, viable, or economical as a large supply source during this period when much land was set aside for Indian reservations, it would be difficult, if not impossible, for a court to attribute to the Federal government reserving such lands any intent to reserve groundwater for use upon them. In fact, none of the *Winters* doctrine cases cited earlier even mentioned groundwater as an additional or alternative source to surface stream flow, although alternative sources, such as natural springs, were urged in one case by a party opposing any implication of reserved surface flow rights. *Winters v. United States, supra.* What seems apparent is that the speculative possibility of an available groundwater supply underlying reserved lands had no effect on Federal government decisions to reserve those lands up until at least the 1920's and that the fact that such groundwater potential was not even mentioned in heavily contested cases over surface waters allegedly reserved during the same period shows that people realized that groundwater was not considered by the Federal government. It seems clear, therefore, that before the 1920's no court could reasonably attribute any intent to reserve groundwater to the Federal government regarding

any reservation of land where water needs were great. Therefore, while the *Winters* doctrine may include groundwater, it can in application only result in implied reservations of such groundwater for Federal government actions taking place well into the present century.

Amicus State of California knows of only two previous cases in which the possible extension of the *Winters* doctrine to groundwater has been considered. In *Nevada ex rel. Shamberger v. United States,* 165 F. Supp. 600 (USDC, Nevada, 1958), the court held that there was an implied reservation of groundwater rights for 200,000 acres of land reserved as the Hawthorne Naval Ammunition Depot in Nevada. However, this land was reserved over the period of 1926 to 1935, at the time when groundwater was first given heed as a potential water source. Therefore, the court could have reasonably attributed the necessary intent to the Federal government. It should be noted, however, that this case was eventually affirmed on another ground, lack of consent to sue the United States. *Nevada ex rel. Shamberger v. United States,* 279 F.2d 699 (9th Cir. 1960).

The other *Winters* groundwater case, *Tweedy v. Texas Company,* 286 F.Supp. 383 (USDC, Montana, 1968), did not actually hold that *Winters* applied to groundwater, deciding the case on the ground that even if it did, the reserved right claimants had shown no need or use for the groundwater and thus had no protectible rights. In *Dictum,* however, the court said, at page 385:

> "When the Blackfeet Indian Reservation was created, the waters of the reservation were reserved for the benefit of the reservation lands (cite *Winters*). The *Winters* case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference."



In this case, the land was apparently reserved no later than 1908, at a time when groundwater was not highly considered as a water source. Amicus, State of California, would therefore urge that the court in *Tweedy* is incorrect in remarks as to an implied reservation. Amicus would further note that the court recites no facts indicating that any underlying groundwater source was known to the Federal government at the time it reserved this land. This is in contrast to the *Winters* surface water cases in which streams were recited as flowing across or alongside the reserved land. What the *Tweedy* court appears to have done, therefore, is to glibly posit the application of *Winters* without analyzing whether the intent requirement of *Winters* really applies to the factual context of the case before it.

In view of the severe social disruption that will result from application of the *Winters* doctrine to groundwater, Amicus, State of California, urges that this Honorable Court not so extend that doctrine. If, however, the *Winters* doctrine is generally applicable, we urge the Court to declare the necessity of finding an intent to reserve groundwater at the time the reservation was made and to declare that such intent must be based on evidence of the knowledge of groundwater basins, the extent of technology for extracting groundwater, and the general opinion as to the feasibility of groundwater as a large supply source that existed at that time.

II

**The Administrative Decision of the Nevada State Engineer Was Not One Which Could Operate as a Res Judicata Bar to the United States Action Against the Cappaerts**

We think it clear that, under appropriate circumstances, the doctrine of *res judicata* is applicable to administrative decisions. In *United States v. Utah Const. & Mining Co.*, 384 U.S. 394 (1966), for example, the Court concluded that the doctrine of *res judicata* is applicable to administrative decisions, even where the United States was a party. As the Court noted:

> "Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." 384 U.S. at pp. 421-22.

Since *Utah Construction*, the federal courts have frequently applied the principles of *res judicata* to final federal administrative decisions. See, *e.g., Safir v. Gibson*, 432 F.2d 137 (2nd Cir. 1970); *Painters District Council v. Edgewood Contracting Co.*, 416 F.2d 1081 (6th Cir. 1973); *Tipler v. DuPont Co.*, 443 F.2d 125 (6th Cir. 1973); *Paramount Transport Systems v. Chauffeurs, etc., Local 150*, 436 F.2d 1064 (9th Cir. 1971); see also *Hobby v. Hodges*, 215 F.2d 754 (10th Cir. 1954). Other cases have applied the same principles to federal court review of *state* administrative



agency decisions. *Groom v. Kawasaki Motors Corp.*, 344 F.Supp. 1000 (W.D. Okl. 1972); *United States v. Fallbrook Public Utilities District*, 165 F.Supp. 806 (S.D. Cal. 1958). Indeed, the *Fallbrook* case is the closest analogy of which we are aware, to the position asserted by the petitioners here.

Lower federal appellate courts have recognized, however, that the doctrine of administrative *res judicata* is not one which may be applied unblinkingly to each and every factual situation. In *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969), for example, the Fourth Circuit concluded that *res judicata* effect should not be given to a decision containing "error on the face of the evidence." The Ninth Circuit itself has established a similar rule, by concluding:

> "[C]ollateral estoppel effect should be given only to those administrative determinations that have been made in a proceeding fully complying with the standards of *procedural and substantive due process* that attend a valid judgment by a court and further, that such effect should be accorded only to those findings upon material issues that are supported by *substantial evidence* on the administrative record as a whole." *Paramount Transport Systems v. Chauffeurs, etc., Local 150, supra*, 436 F.2d 1064, 1065-66 (Emphasis added).

The cases from the Fourth and Ninth Circuits are consistent with several cases from this Court. In *Pearson v. Williams*, 202 U.S. 281 (1906), the Court refused to give *res judicata* effect to a decision of an immigration board of special inquiry, in part on the grounds that the board conducted a summary proceed-

ing, and could not compel witnesses to attend. In a later case, however, where the administrative hearing was clearly proper, the findings were based upon substantial evidence, and the orders were within the jurisdiction of the administrative agency, the Court applied the doctrine of administrative *res judicata*. *Sunshine Anthracite Coal Company v. Adkins*, 310 U.S. 381 (1940).

After analyzing these cases, as well as the various policy factors which underlie the doctrine of *res judicata*, Professor Davis has concluded:

> "The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor." Davis, *Administrative Law Treatise*, Vol. 2, §18.02.

Davis further notes:

> "The reasons behind the doctrine as developed in the court system are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others. As a matter of principle, therefore, the doctrine should be applied to some administrative proceedings, modified for some, and rejected for others." *Id.* §18.12.

We believe this analysis to be sound, and urge the Court to adopt it here.

If the Court rules against Nevada's position on the issue of administrative *res judicata*, however, we urge the Court not to reject the doctrine in broad terms. Rather, we urge the Court in that event to confine



its holding to the limited facts of this case. In this connection we note the United States, against whom Nevada seeks to apply that doctrine, was not the applicant in the proceeding before the State Engineer, but rather was the opponent of the application. The Ninth Circuit apparently regarded this distinction as critical, for it noted that "the United States was neither a defendant nor served with process in the proceedings before the State Engineer." Slip Opinion, 12.

There are several reasons which militate against the application of the doctrine of administrative *res judicata* to those who oppose an application for a permit to appropriate water, as opposed to the applicant himself. First, the opponents of the application are primarily motivated merely to oppose a pending application, not to thoroughly litigate the underlying validity of their own claims. Thus, to bar such persons from later asserting their own claims may have the effect of discouraging informed participation in such proceedings.

Second, to bar such persons from later asserting their own claims may have the effect of unduly encouraging litigation. If each participant in the administrative proceeding risks the binding nature of the administrative decision because of his appearance in the proceeding, each participant must initiate proceedings in the appropriate court if there is any possibility, however slight, that the administrative decision may at some future time affect his rights. Only by such action could the protestant insure that the administrative decision, however erroneous, would not be binding upon him. Thus, to apply the doctrine of administrative *res judicata* to such persons may encourage an increased number of legal actions seeking to review State administrative decisions.

Thus, if the Court rules against Nevada's position on the issue of administrative *res judicata,* we urge the Court not to repeat the broad comment of the Ninth Circuit on that issue. In particular, the lower court stated that, "[a]lthough the State Engineer may have expertise in the administration of Nevada's water laws, there is not evidence that he is qualified to consider or decide the complex issues of federal law involved in this case." Slip Opinion, 13. This statement might be taken to assume that State administrative agencies have no expertise to determine the water needs of the United States under federal law, even when the United States is the applicant for a permit to appropriate water for federal purposes. This result would immunize the United States from the doctrine of administrative *res judicata,* even when it initiates the proceedings before the State agency and is given a full opportunity to present its case.

Our interest on this issue derives primarily from an action now pending in a federal district court in California. See *United States v. California,* S-3104 (E.D. Cal.). In that case, the United States applied to the California Water Resources Control Board for a permit to appropriate water for storage at the New Melones Dam on the Stanislaus River. The State agency conducted a lengthy hearing on the application of the United States, involving the testimony of many witnesses and the production of numerous exhibits. After the hearing, the State agency granted the permit, subject to certain conditions. The United States never sought judicial review of the agency's decision and the decision became final under California law. The United States later filed its action against California in the federal court, claiming that the State agency exceeded its power under section 8 of the Reclamation Act of 1902. 43 U.S.C. §383. One of the issues in the case is whether the evidence supports the findings of the State agency, which led to the conditions in the permit. California asserts that the United States is now precluded, by the doctrine of administrative *res judicata,* from challenging the validity of these findings. Since the United States initiated the proceeding before the State agency by applying for a permit, that case is distinguishable from the instant case, where the United States simply appeared in opposition to the Cappaerts' application. Thus, an overly broad comment on the doctrine of administrative *res judicata* in this case may have an undue effect on the California case, and is, moreover, not warranted by the facts of this case.



In any event, we urge the Court to reaffirm the holding of *United States v. Utah Const. & Mining Co., supra,* 384 U.S. 394, that under appropriate circumstances, the doctrine of *res judicata* applies to administrative determinations. A broader comment is not warranted by the limited facts of this case.

## Conclusion

For the foregoing reasons, it is respectfully requested that the decision of the Court of Appeals be reversed as to the extension of the *Winters* doctrine to groundwater; but if it not be reversed, that this Court limit said extension as heretofore delineated. It is also respectfully requested that irrespective of its conclusion as to the applicability of *res judicata* in this case, this Court affirm the general application of this rule of law to state administrative hearings.

Respectfully submitted,

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MOTION FILED

OCT 17 1975

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1304

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, *et al.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer, *Intervenor*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY AND PAPAGO TRIBE

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On Writ of Certiorari to the United States
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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The Salt River Pima-Maricopa Indian Community and the Papago Tribe request leave to file the attached Brief *Amicus Curiae* in support of the respondent United States of America. The United States has consented to the filing of this brief. At the time of filing, no response to the request for consent had been received from the petitioners.

The Salt River and Papago Tribes occupy lands in the State of Arizona set aside by Executive Order for their permanent use and occupation. Each of the

Tribes is dependent upon groundwater as a major source of water supply. The question of whether the implied reservation doctrine extends to groundwater is of vital significance to them.

Although matters relating to Indian rights and hydrological factors have been mentioned in the briefs of the parties and the *amici* states submitted to this Court, the Tribes are aware that the factual setting of the instant case precluded adequate discussion of these issues therein. For this reason, the Tribes have undertaken in the attached Brief *Amicus Curiae* to touch upon certain general hydrological considerations to provide a more complete perspective on the groundwater question at issue as well as several important legal factors omitted from other discussions regarding the nature and extent of Indian rights in reserved lands. The Tribes feel that the discussion contained in the attached brief will add a different perspective to the questions at issue in this case.

The Salt River Pima-Maricopa Indian Community and the Papago Tribe, therefore, respectfully request this Court to grant permission to file the attached brief.

Respectfully submitted,

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17 October 1975

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## BRIEF AMICUS CURIAE OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY AND PAPAGO TRIBE

### I.

### SURFACE AND GROUNDWATER SHOULD NOT BE ACCORDED SEPARATE TREATMENT UNDER THE IMPLIED RESERVATION DOCTRINE.

In applying the reserved rights doctrine to Devil's Hole in Death Valley National Monument, the Court of Appeals for the Ninth Circuit properly treated groundwater in the same manner as this Court has

treated surface waters. Based upon principles enunciated in prior decisions of this Court, the Court of Appeals found that the power of the United States to reserve waters for the use and benefit of federal enclaves extended to underground as well as surface water. *See United States* v. *District Court of Eagle County,* 401 U.S. 520 (1971); *Arizona* v. *California,* 373 U.S. 546 (1963); *Winters* v. *United States,* 207 U.S. 564 (1908). *Amici* Tribes believe that the Ninth Circuit has correctly decided the reserved water rights issue and that the principles underlying these decisions compel affirmance of their decision below.

*Amici* further submit that apart from the sound legal theories upon which the Ninth Circuit decision is based, other important considerations also support the application of the implied reservation doctrine to groundwater.

Petitioners and the *amici* states supporting their position urge, in one form or another, that this Court draw a hard and fast distinction between ground and surface waters. They ask that reserved rights be limited to surface waters. In so doing, they seek to repeat the mistakes of the past which have recently been recognized and universally condemned. Worse, they are urging the adoption of laws and policies that are in direct conflict with physical realities and which will inevitably lead to wasting the West's most valuable natural resource.

The first principle to be recognized in analyzing the relation of the reserved rights doctrine to groundwater is that the outcome is in no way determinative of the quantum of the reserved right. Whether or not reserved rights include groundwater can not increase



or diminish the amount of irrigable land or the quantity of water required to fulfill the purpose(s) for which a particular reservation was established. A refusal to apply the reserved rights doctrine to groundwater would simply compel the federal government and the Nation's Indian tribes to satisfy their prior and paramount rights exclusively from surface waters, even if such waters were already over-appropriated and there existed available groundwater that could be utilized. No federal establishment would be willing to switch to or depend upon groundwater where its potential groundwater rights were more precarious and subject to interference by others than its reserved rights to surface waters.

A second consideration is that an inflexible rule restricting the implied reservation doctrine to surface waters would not permit optimal use to be made of existing sources of water supply. Such a restriction would further burden many already overtaxed state surface water systems and preclude utilization of alternative sources of water supply where the interests of the water system so demanded.

To appreciate the negative features of such a rule, one must look at what effect it would have if applied to a situation where the surface water supply is already over-appropriated and groundwater is available for utilization. Notwithstanding the existence of the latter source of water supply, the holder of the reserved right would be compelled to use surface water thereby further burdening the surface water system to the detriment of all existing water users. However, if groundwater were included within the scope of the reserved right, the federal reservation in such circumstances could draw upon that source of water in order

to lessen interference with existing uses. Such a measure would increase the amount of water available for use in a given water system.

The concept of using alternative sources of water supply in water shortage areas is not new. The desirability of this type of flexibility insofar as water and water rights are concerned has long been recognized. Illustrative of the situations where use of alternative sources of water has been considered is the well-known California Supreme Court case, *Rancho Santa Margarita* v. *Vail,* 11 Cal. 2d 501, 91 P.2d 533 (1938). In that case, suit was brought by a lower riparian landowner against an upstream user to enjoin interference with the flow of the Temecula-Santa Margarita River. There was insufficient surface water to supply all the riparian needs of either the upper or the lower riparian landowner. The State Supreme Court ordered the lower court on retrial to work out a physical solution to the problem investigating the possibility of requiring the lower riparian landowner to satisfy part of his needs from the groundwater table underlying his lands. Requiring all of the surface flow to reach the downstream landowner would have been wasteful.[1]

It is this type of flexibility which would be destroyed by a rigid rule restricting the implied reservation doctrine to surface water. A rule of this sort would compel the overburdening of surface water systems notwithstanding the existence of alternative sources of water supply.

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[1] Recently the National Water Commission encouraged the states to use the type of flexibility employed by the California Supreme Court in deciding water rights cases. ". . . [T]he states should consider employing the flexible powers of the equity court to least-cost physical solutions." National Water Commission, "Water Policies for the Future, Final Report to the President and the Congress of the United States", p. 232 (1973).



A further consideration which supports the extension of the implied reservation doctrine to groundwater is the physical interdependence of surface and groundwater systems. Physical and hydrological factors plainly demonstrate the irrationality and destructiveness of making the surface-groundwater distinction that is so strenuously urged by petitioners.

It is a well-settled hydrological fact that surface and groundwaters are often physically interconnected. "Water Policies for the Future", *supra* at 233. Where this relationship exists, the use of one water source directly affects the supply of the other. *See* C. Corker, "Groundwater Law, Management and Administration", pp. 146-147, prepared for the National Water Commission, October, 1971. *Also see* R. Moses, "Basic Groundwater Problems", 14 Rocky Mt. Min. Instit. 501, 518-522 (1960). Accordingly, the regulation of either surface or groundwater must take into consideration the existence and regulation of the other. Where this conjunctive regulation does not occur, chaos and confusion in the administration and management of water resources results.[2]

In many states, the use of surface waters came first, followed by groundwater users pumping from aquifers interconnected with the surface streams. Over a period

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[2] Arizona, Colorado, New Mexico and Texas are prime examples of states which have not adequately regulated the use of groundwater nor considered the interdependence between surface and groundwater in their laws regulating these two sources of water supply. *See* "Water Policies for the Future", *supra* at 233-238, for a detailed discussion of the problems encountered by these states in attempting to rectify their past failures to consider the interconnection of surface and groundwater in the regulation of water resources in their respective states.

of time, depletion of the underground aquifer (as a result of pumping faster than the aquifer could be naturally recharged) reduced surface flow, causing senior users to be deprived of their prior right to the use of water by junior pumpers. As a result of the dual water allocation systems in some states, the successful coordination of the rights and priorities of surface and groundwater users has been a virtual impossibility. *See* "Water Policies for the Future", *supra* at 233. The effects of this "hydrologic bicycle" (R. Moses, "Basic Groundwater Problems", *supra* at 503) have been so serious that experts now strenuously urge that the elimination of ". . . arbitrary distinctions between surface and groundwater . . . be an overriding objective." C. Corker, "Groundwater Law, Management and Administration", *supra* at 147.

Recognizing the destructiveness of state water law systems which fail to take into account the hydrological relationship between surface and groundwater, the National Water Commission has specifically pointed out the need for integrated treatment of surface and groundwater:

> The Need for Integration: Ground water is often naturally interrelated with surface water: ground water feeds springs and surface streams, and surface water charges ground water reservoirs. Nevertheless, there persists in the laws of many States myths (long ago abandoned by hydrologists) that ground water is separate from and unrelated to surface water.
>
> Recommendation No. 7-1: State laws should recognize and take account of the substantial interrelation of surface water and ground water. Rights in both sources of supply should not be separate codifications of surface water law and ground water law; the law of waters should be a single, integrated body of jurisprudence. "Water Policies for the Future", *supra* at 233.



The conjunctive treatment of surface and groundwaters is not merely a theory that assumes importance only in the context of conflicting claims by one state water user against another. It is equally important, where, as here, the rights involved are federal against state.

*Amici* believe that a decision to afford disjunctive treatment to surface and groundwater under the implied reservation doctrine would be disastrous to those states having federal reservations within their boundaries, as well as to the reservations. To illustrate the destructiveness of such a decision, one need only look to the practical effect such a restriction would have on the state in which *amici* Tribes are located. The circumstances affecting the Papago Tribe are ideal for examination.

The San Xavier portion of the Papago Reservation lies within the Santa Cruz River System. The eastern portion of the San Xavier Reservation is traversed by the Santa Cruz River. From time immemorial, surface flow from this river was used to irrigate Papago lands. Uncontrolled, off-reservation groundwater pumping by state water users [3] extinguished the surface flow in the river forcing the Papagos in recent years to abandon surface diversion as a method of

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[3] Arizona basically adheres to the reasonable use doctrine which permits unlimited pumping of groundwater so long as it is put to beneficial use of the overlying lands. *See* Bristor v. Cheatum (Bristor II), 75 Ariz. 227, 255 P.2d 173 (1953). *Also see* D. Mann, "Law and Politics of Groundwater in Arizona", 2 Ariz. L. Rev. 241 (1959-1960).

irrigating their lands. The water table underlying the reservation dropped to such a level that surface flow could not be maintained. Presently, the Santa Cruz River flows only when least needed—in time of flood. As a result, the Papagos have been required to pump groundwater to meet their water needs.[4] No alternative water sources are presently available.

Because of the existence of a physical relationship between surface and groundwater in the water systems serving the San Xavier Reservation, a holding that the implied reservation doctrine extends to surface but not to groundwater would mean that no one whose claim is junior to that of the Papago Tribe could pump groundwater required to maintain the stream flow on the reservation. Paradoxically, this would produce nothing short of economic waste of the groundwater resources concerned. Valuable water resources would be utilized to maintain stream flow rather than put to their optimal use.

The result described in this illustration could easily occur. As to those persons whose pumping activities commenced subsequent to the date of the establishment of the reservation (nearly all current users), the Papago surface water rights are prior and paramount,

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[4] The groundwater level underlying the reservation has dropped so drastically in recent years that pumping is becoming economically unfeasible. To rectify this situation the United States on behalf of the Tribes and the Tribes have brought suit against several major water users who are pumping adjacent to and in the vicinity of the reservation. *See* United States v. City of Tucson *et al.*, (D. Ariz. Civ. No. 59-39 TUC JAW, filed February 20, 1975); Papago v. Pima Hiking Co. *et al.*, (D. Ariz., Civ. No. 75-51, filed March 6, 1975).



and as such, are entitled to protection against interference. *Winters* v. *United States,* 207 U.S. 564 (1908).

Since the protection of reserved rights in surface flow would negate the effect of excluding groundwater from the application of the implied reservation doctrine, there are no benefits to be gained from making a legal distinction between the hydrologically connected water sources. There are, however, significant benefits that would accrue from including groundwater within the scope of the implied reservation doctrine. If a federal reservation were not utilizing its groundwater entitlement, or any portion thereof, that amount could be pumped by water users pursuant to state law. Should the water become necessary for reservation use, pumping by state water users would be reduced correspondingly. This result would be infinitely preferable to restricting the pumping activities of state water users in order to maintain the stream flow.

Applying the implied reservation doctrine to groundwater promotes economic and efficient use of existing sources of water supply. Restricting the doctrine to surface water, ignoring the interrelation between surface and groundwaters and applying one set of laws to surface waters and a disparate set to groundwater, all as urged by the petitioners and their *amici,* would create problems far worse than the reserved rights doctrine they indirectly seek to undercut. The path of least resistance as well as sound and practical water resource management lies in the course adopted by both the District Court and the Court of Appeals and urged by the National Water Commission and all of the scholars who have recently addressed

the issue—conjunctive treatment of ground and surface waters.[5]

## II.

## INDIAN WATER RIGHTS CLEARLY EXTEND TO BOTH GROUND AND SURFACE WATER

Several of the briefs submitted to the Court have made specific reference to Indian reservations in their discussion of the implied reservation doctrine.[6] Limiting interpretations as to the scope of the doctrine are urged with equal force against both reservations set apart for Indian purposes as well as those established for other purposes. *Amici*, therefore, feel that it is necessary to clarify for the Court certain principles that apply to Indian rights in reserved lands which preclude the imposition of the asserted limitations on Indian water rights.

### A. Indian Reservations and the Extent of Indian Rights in Such Lands.

Foremost among the principles to which *Amici* refer is the nature of the rights held by Indians on the lands reserved for their exclusive use and occupancy. At

[5] For an excellent example of superb judicial treatment of a complex groundwater—surface water—imported water—problem in the Los Angeles area, *see* City of Los Angeles v. City of San Fernando, —— Cal. 3d ——, 537 P.2d 1250 (1975). The Supreme Court of California affirmed its prior holdings that Los Angeles' Pueblo right, which closely resembles the reserved rights here at issue but traces its origin to Spanish and Mexican Law, includes the ground as well as surface contributors to the Los Angeles River system. The Court's opinion also illustrates the obvious problems that would be created by disjunctive treatment of ground and surface waters.

[6] *See, e.g.*, Brief of Intervenor-Appellant State of Nevada, pp. 14-20; Brief of *Amicus Curiae* State of California, pp. 6-8.



the core of the reservation system was the federal policy of transforming Indians from a nomadic to a pastoral and civilized people. *Winters* v. *United States*, 207 U.S. 564, 576 (1908). To accomplish this goal, it was thought necessary to secure to the Indian people a permanent home through which their "improvement, comfort and welfare" would be promoted and through which they would ultimately become "self-supporting as a peaceable and agricultural people." *Conrad Investment Co.* v. *United States*, 161 F. 829, 831-832 (9th Cir. 1908). *Also see United States* v. *Walker River Irrig. Dist.*, 104 F.2d 334, 339 (9th Cir. 1939).

To this extent, the federal government has assured to Indian tribes "unqualified possession of the land in perpetuity." *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1939). This "unqualified possession" is in fact beneficial ownership of the lands occupied and is considered "as sacred and safeguarded as is fee simple absolute title." 304 U.S. *supra* at 117; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-565 (1903). It is clear from the nature of Indian possession that all incidents of landownership necessary to achieve full beneficial use of the lands are secured to Indian tribes.[7] Primary among these incidents of landownership are rights to the use of all natural resources located within the boundaries of the reservation, whether overt or latent.[8] *See United States* v. *Shoshone Tribe,* 304 U.S.,

[7] The only incident of ownership restricted to Indian tribes is the power of alienation without the consent of the sovereign. *See* United States v. Shoshone Tribe *supra* at 117.

[8] *Amicus Curiae* State of California argues that for federal reservations created prior to 1920, there could have been no intention to reserve groundwater because the state of knowledge concerning the resource was not such that the federal government could have contemplated its inclusion among the rights secured to

*supra* at 116; *United States* v. *Walker River Irrig. Dist.*, 104 F.2d, *supra* at 338; *United States* v. *5,677.94 Acres of Land*, 162 F.Supp. 108, 155 (D. Mont. 1958). *Also see* 34 Op. Att'y. Gen. 171, 178 (1924).

This Court and the other federal courts in the above cited decisions have consistently recognized the incidents of landownership that the various Indian tribes enjoy in the federal reservation system. The courts, in their recognition of the Indian rights in reservation lands, have decided these cases in view of the strong federal policy of making Indian reservations viable and self-sustaining.

This strong federal policy of securing a productive, permanent home for the Indians must also be viewed in light of the liberal rules of construction employed in interpreting treaties, agreements, statutes and executive orders affecting Indians. As this Court has stated many times, ambiguities must be resolved in favor of the Indians. *Antoine* v. *Washington*, 420 U.S. 194, 199-200 and 206 (1975); *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 174 (1973); *Menominee Tribe* v. *United States*, 391 U.S. 404, 406, n. 2 (1968); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Winters* v. *United States*, 207 U.S. 564, 576 (1908).

*Amici* tribes submit that the federal policy, when viewed with the rules of construction applicable to Indians, leaves this Court no other alternative than to hold that the implied reservation doctrine extends to groundwater.

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Indians. This argument is without merit. Since this issue is not before the Court, *Amici* will not attempt to refute the argument other than to state that there is ample documentation of early groundwater use by Indians in the western states.



**B. Preexisting Indian Rights**

The fact that reservations were to serve as a permanent homeland, upon which Indians would become self-sustaining, is not the only basis for the conclusion that Indian water rights necessarily extend to groundwater. An additional basis for this conclusion is the presence of preexisting Indian rights.

In the case of treaty reservations, for example, it is well-established that rights inuring to the Indian tribes occupying such lands did not originate by treaty but rather arose by virtue of their aboriginal occupation. At the time Indian tribes ceded their vast domain to the United States by treaty, they had "command of the lands and waters—command of all their beneficial use," whether for hunting, grazing livestock or agriculture and the arts of civilization. *Winters* v. *United States*, 207 U.S. 564, 576 (1908). The rights fixed pursuant to treaty were not "a grant of rights to Indians, but a grant of rights from them—a reservation of those not granted." *United States* v. *Winans*, 198 U.S. 371, 381 (1905). *Accord, United States* v. *Ahtanum Irrig. Dist.*, 236 F.2d 321, 326 (9th Cir. 1956), *cert. denied* 352 U.S. 988 (1957). Thus, to the extent that the right to the use of the waters was not specifically ceded or granted to the United States, it was reserved to the Indians. *Skeem* v. *United States*, 273 F. 93, 95 (9th Cir. 1921). The rights so reserved are " . . . continuing against the United States and its grantees as well as against the state and its grantees." *United States* v. *Winans*, 198 U.S., *supra* at 381-382; *Winters* v. *United States*, 143 F. 740, 749 (9th Cir. 1906).

The concept of preexisting rights is not, however, limited to treaty reservations. As to those Indian

tribes occupying Executive Order reservations in their aboriginal lands, principles similar to those discussed in connection with treaty reservations apply.

Indian tribes occupying Executive Order reservations, like treaty tribes, had command of all beneficial use of land and waters within their aboriginal domain. Such possession has always been recognized as complete and exclusive until terminated by Congress. *Lone Wolf* v. *Hitchcock*, 187 U.S., *supra* at 564-565, 34 Op. Att'y. Gen., *supra* at 180. *Also see Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974), *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279 (1955), *United States* v. *Santa Fe Ry. Co.,* 314 U.S. 339, 345-347 (1941), *Mitchel* v. *United States,* 9 U.S. (Pet.) 746, 9 L.Ed. 283, 296 (1835). The nature of a tribe's aboriginal rights are such that this Court has held that they are not extinguished in outlying lands simply because a reservation is established for the tribe. *United States* v. *Santa Fe Ry. Co.,* 314 U.S., *supra* at 353. *Accord, Gila River Pima-Maricopa Indian Community* v. *United States,* 494 F.2d 1386, 1390 (Ct. Cl. 1974); *Turtle Mountain Band of Chippewa Indians* v. *United States,* 490 F.2d 935, 945 (Ct. Cl. 1974).

The application of this rule to outlying lands makes an even stronger case for non-extinguishment of rights in those aboriginal domain lands secured to the Indians by the Executive. This position was considered and received the approbation of Attorney General Harlan F. Stone in a comprehensive opinion concerning the nature and extent of Indian rights in Executive Order reservations:

> In respect to legislation and treaties of this character [referring to those entitling Indians to the benefits of latent resources] two views are possible. First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden and latent resources, merely gives them its own property as an act of grace. *Second, that the Indian possession extended to all elements of value in or connected with their lands, and the government, in securing those values to the Indians, recognizes and confirms their preexisting right.* If it were necessary here to decide as between these opposing views, I would incline strongly to the latter; merely because the Indian possession has always been recognized as complete and exclusive until terminated by conquest, treaty, or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553. Moreover, support for this view is found in many expressions of the courts. 34 Op. Att'y. Gen., *supra* at 180. (emphasis supplied.)



These authorities, together with the rule that extinguishment of aboriginal rights will not be lightly implied (*United States* v. *Santa Fe Ry. Co.,* 314 U.S. *supra* at 354), make it clear that the rights held by tribes in such reservations are preexisting rights and that the establishment of reservations within the aboriginal domain of a particular tribe does nothing more than confirm its already complete and exclusive aboriginal occupancy rights.

Thus, the rights attaching to treaty reservations, and Executive Order reservations carved out of aboriginal lands, are not to be considered as new and acquired rights, flowing to the Indian tribes from the sovereign, but rather as an undiminished continuation of the

rights already held. Since Indian tribes at the time of reservation establishment had command of all lands and waters within their domain, a simple reduction in the area to be occupied by them could not alter the extent of the rights held.

## CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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